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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Alfred C. Sikes, Chairman

James H. Quello

Patricia Diaz Dennis

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**Andrew C. Barrett

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*Commissioner Marshall sworn in on August 21, 1989.

**Commissioner Barrett sworn in on September 8, 1989.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

RCA AMERICAN COMMUNICATIONS, INC. Transmittal No. 293
Tariff F.C.C. Nos. 1 and 2

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1989; Released: August 28, 1989

By the Commission:

I. INTRODUCTION

1. This Order concludes an investigation involving RCA American Communications, Inc. (Americom), now GE Americom. The above-referenced transmittal was suspended for one day and set for investigation by the Common Carrier Bureau (Bureau) in *RCA American Communications, Inc.*, Mimeo No. 1289, released June 2, 1981 (*Suspension Order*). That Order also imposed an accounting order and invited interested persons to file petitions asking that particular issues be designated for investigation.[1] The Bureau subsequently designated issues for investigation and described the standard to be used in determining whether the increased Americom rates are reasonable.[2] Finally, in *RCA American Communications, Inc.*, Memorandum and Opinion Order, 2 FCC Rcd 2363 (1987) (*Final Order*), all issues, except for the question of the rate impact of crediting Americom's ratepayers with $20.8 million in insurance proceeds, were resolved by this Commission. We reaffirmed our resolution of these issues on reconsideration. *RCA American Communications, Inc.*, 3 FCC Rcd 1184 (1988) (*Reconsideration Order*). This Order resolves the one remaining issue in our Transmittal 293 investigation – the rate effect of crediting the insurance proceeds.

II. BACKGROUND

2. The *Final Order* resolved most of the issues in the pending investigation of Americom's Transmittal No. 293 in Americom's favor.[3] In particular, we found that of the $70 million in insurance proceeds received by Americom for the loss of SATCOM F-3,[4] Americom passed through approximately $49.1 million to ratepayers.[5] The lion's share of this amount, $43.6 million, was written off in the form of a credit for the asset value of SATCOM F-3, thus reducing future rates from what they would have been if the cost of SATCOM F-3 had been included in the rate base.[6] In addition, Americom used part of the insurance proceeds, $5.5 million, to recover the difference between the amount Americom paid AT&T for transponder capacity and the amount Americom charged its customers under the then-effective tariff.[7]

3. Even though we determined that Americom had credited $49.1 million to its ratepayers, we also found that Americom should have credited the entire $70 million to its ratepayers because we found that it had charged to its ratepayers the premium for the insurance policy for SATCOM F-3. We then concluded that Americom should, *inter alia*, reduce its revenue requirement to reflect a credit to the rate base of some portion of the remaining $20.8 million in insurance proceeds for SATCOM F-3. We directed Americom to file a pleading explaining how it would reflect the credit in the rates paid by Americom's ratepayers.[8] Subsequently, Americom filed a petition for reconsideration of the disposition of this issue in the *Final Order*, which we denied.[9]

4. On July 22, 1987, Americom filed a pleading in which it ostensibly addressed the issue of how the $20.8 million should be credited to its customers. The Bureau decided, however, that Americom's pleading required some clarification and, in a December 3, 1987, letter, requested that Americom file a response which would explain its July pleading.[10] Americom filed its response on February 8, 1988.[11]

5. Americom's February letter proposed to apply the insurance proceeds to its revenue requirement over the projected useful life of the satellite – seven years.[12] Americom then subtracted this credit from the total annual space revenue requirement beginning in 1980, the year that SATCOM F-3 would have gone into service. According to Americom, even applying the proceeds in this manner would not give it a 15 percent rate of return over those seven years. Rather, even with the offset to revenue requirement resulting from crediting these proceeds, its earnings for those seven years beginning in 1980 still ranged from a low of 4.9 percent in 1986, to a high of 12.5 percent in 1982.[13]

III. DISCUSSION

6. Americom first has argued that because it is now non-dominant, and thus lacks market power, its rates are presumptively reasonable and our investigation should be terminated because of Americom's changed status.[14] This Commission did not address this issue in either the *Final Order* or the *Reconsideration Order*.[15]

7. We need not address this issue, however, because the challenged rates were filed, the investigation was initiated, and SATCOM F-3 insurance proceeds were paid before Americom achieved its non-dominant status.[16] Thus, the resolution of these issues is not affected by Americom's later status as non-dominant. Any other decision would essentially give retroactive effect to Americom's non-dominant status. This clearly was not our intent when we originally granted domestic satellite carriers (domsats) non-dominant status. *See generally, Competitive Carrier Rule Making*, 95 FCC 2d 554 (Fourth Report & Order). We therefore conclude that allowing Americom to raise arguments based on its non-dominant status would unreasonably extend the scope of our *Competitive Carrier* decision with respect to domsats.

8. Americom has also argued that, even if we refuse to recognize Americom's non-dominant status for purposes of the insurance proceeds, it should be allowed to keep those proceeds because of its low rate of return during the period in question. Americom has argued that application of the insurance proceeds will only have a nominal impact on its earnings, that crediting the insurance proceeds will not give Americom the 15 percent rate of return it seeks, and that we accepted 15 percent as a reasonable rate of return.[17]

9. Although we reject Americom's arguments regarding its non-dominant status, we nevertheless conclude that Americom need not refund or otherwise adjust its rates. Americom has demonstrated that application of the $20.8 million in proceeds over the life of the satellite and over all relevant services has only a nominal effect on rates and still leaves it with a rate of return during the seven years in question significantly below its prescribed rate of return. After SATCOM F-3 was in fact lost, Americom ratepayers received reduced rates by virtue of Americom's having applied the $43.6 million credit; they also received the service they contracted for because of the additional $5.5 million Americom paid AT&T.[18] We conclude that, in view of all the circumstances, the record does not warrant ordering Americom to give refunds to its 1988 Fixed Term Transponder customers. Accordingly, we do not require Americom to make any rate adjustments as a result of our earlier Orders.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 204(a), and 205 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 204(a), 205, that the investigation regarding RCA American Communications, Inc., Tariff F.C.C. Nos. 1 and 2, Transmittal No. 293, IS TERMINATED.

11. IT IS FURTHER ORDERED that the accounting orders established with respect to the insurance proceeds from the failure of RCA American Communications, Inc.'s SATCOM F-3, ARE TERMINATED.

12. IT IS FURTHER ORDERED that the petitions to review filed jointly by Showtime/The Movie Channel, the Christian Broadcasting Network, Eastern Microwave, Inc., Heritage Village Church and Missionary Fellowship, Inc., and Southern Satellite Systems, Inc., and by Trinity Broadcasting Network, Inc. and Rainbow Communications, Inc., in response to RCA American Communications, Inc., Tariff F.C.C. Nos. 1 and 2, Transmittal No. 293, ARE DENIED to the extent indicated in this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Petitions were filed jointly by Showtime/The Movie Channel (Showtime), the Christian Broadcasting Network (CBN), Eastern Microwave, Inc. (EMI), Heritage Village Church and Missionary Fellowship, Inc. (PTL), and Southern Satellite Systems, Inc. (SSS). Trinity Broadcasting Network, Inc. (TBN), and Rainbow Communications, Inc. (RCI) also filed petitions. Americom filed responsive pleadings.

[2] *See* RCA American Communications, Inc., Mimeo No. 6153, released Aug. 6, 1985 (*Investigation Order*).

[3] For a more complete recitation of the history of this proceeding, see the *Final Order*, 2 FCC Rcd 2363, and the *Reconsideration Order*, 3 FCC Rcd 1184.

[4] The insurance was purchased by Americom for $3.3 million to protect both its capital investment of $40.3 million in SATCOM F-3 and certain anticipated revenues. Therefore, since Americom used $43.6 million to reduce its rates and $5.5 million to provide the service that would have been provided on SATCOM F-3, the $20.8 million would cover the anticipated revenues. *See Final Order*, 2 FCC Rcd at 2369 n.41.

[5] *Final Order*, 2 FCC Rcd at 2369; *see* Americom Direct Case at Question 6, pp. 2-4.

[6] *Final Order*, 2 FCC Rcd at 2369; *see* Americom Direct Case at Question 6, pp. 2-4.

[7] *Final Order*, 2 FCC Rcd at 2369; *see* Americom Direct Case at Question 6, pp. 2-4.

[8] *Final Order*, 2 FCC Rcd at 2369.

[9] *Reconsideration Order*, 3 FCC Rcd at 1184.

[10] Letter of Dec. 3, 1987, from Chief, Common Carrier Bureau, to Carl J. Cangelosi, Esq., RCA American Communications, Inc.

[11] Letter of Feb. 8, 1988, from Jay E. Ricks and Peter A. Rohrbach, RCA American Communications, Inc., to Chief, Common Carrier Bureau.

[12] *See id.* at 2.

[13] *Id.* at 5; *see also* Americom Reply to Showtime's Response to Americom's Direct Case Supplement, filed Aug. 17, 1987.

[14] *See* Americom Direct Case at 40-46; Americom Reply to Showtime's Response to Americom's Direct Case Supplement at 8.

[15] *See Final Order*, 2 FCC Rcd at 2374 n.47.

[16] Americom's customers contend that the premium was included under Financial Information in Americom's Transmittal No. 78, filed prior to 1981. 2 FCC Rcd at 2369-70.

[17] *See* Americom Direct Case Supplement at 5-9. As an initial matter, we agree with Americom that our *Final Order* accepted a 15 percent rate of return for Americom. For example, the *Final Order* said:

> RCA Americom argues that its increased rate of return reflected higher inflation, greater risk premiums (as evidenced by the loss of SATCOM F-3) and the need to provide investors with a competitive rate of return on their capital. We find that these factors for revising the rate of return are reasonable and that RCA Americom has made a credible argument that it could have justified a somewhat higher rate of return on equity than it actually used.

2 FCC Rcd at 2368. We also stated that "[w]e further find that the level of rate increases imposed by RCA Americom's Transmittal No. 293 is reasonable." *Id.* In addition, we noted that "[o]ur review of the pleadings convinces us that the increase in RCA Americom's rate of return from 12 percent to 15 percent is reasonable." *Id.* We conclude that these references, especially when taken together, are a clear indication of our acceptance of a 15 percent rate of return for Americom.

[18] *See* para. 2, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Petition for Rule Making of

THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION — RM-6885

For Amendment of Part 22 of the Commission's Rules Relating to Cellular Radio Service License Renewals

ORDER

Adopted: August 14, 1989; Released: August 15, 1989

By the Chief, Common Carrier Bureau:

1. On August 7, 1989, McCaw Cellular Communications, Inc. (McCaw) filed a "Motion for Extension of Time" in the captioned proceeding. McCaw seeks a 45-day extension up to and including October 2, 1989, in which to submit comments on the above-referenced petition for Rule Making filed June 22, 1989 by the Cellular Telecommunications Industry Association (CTIA). Comments on the CTIA petition are currently due on August 17, 1989, with replies due by September 1, 1989.

2. McCaw argues that an extension will enable it to formulate an informed and detailed proposal that will be of maximum utility to the Commission staff. The petitioner, CTIA, does not object to the extension McCaw asserts. Moreover, the requested 45-day extension would not have any significant impact on either the Commission's decision-making process or cellular licensees, since the first cellular renewals are not due until 1993.

3. McCaw has demonstrated good cause to warrant a grant of a 45-day extension of time in which to file comments, pursuant to Section 1.46 of the Commission's Rules. Such an extension will not substantially delay the Commission's timely consideration regarding the renewal of cellular licenses. Moreover, the petitioner, CTIA, does not object to such an extension.

4. Accordingly, McCaw's motion for an extension is GRANTED to the extent indicated herein. Effective on the release of this *Order*, the comment deadline in the captioned proceeding will be October 2, 1989 with replies due by October 23, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waiver of Section 97.501 of the
Commission's Rules to Authorize
Amateur Service Operation by
IARU Conference Delegates.

ORDER

Adopted: August 18, 1989; Released: August 21, 1989

By the Chief, Private Radio Bureau:

1. The International Amateur Radio Union (IARU), recognized by the International Telecommunications Union (ITU) to provide recommendations for international regulation of the amateur service and the amateur-satellite service, will hold its 1989 ITU Region II Conference (Conference) in Orlando, Florida. Any amateur operator who is also an official delegate or official observer to the Conference as a representative of an amateur service organization in a foreign country is authorized to operate an amateur service station in his/her individual capacity during the Conference provided that he/she complies with the following conditions:

a. The amateur operator must have completed and have accepted by a Commission representative a Form 610-A.

b. The amateur operator must hold a valid amateur service license issued by his/her country of citizenship.

c. The amateur operator must not be a citizen of the United States.

d. All operation of an amateur station must be in accord with Part 97 of the Commission's Rules, 47 C.F.R. Part 97.

2. The station control operator privileges are those authorized by the amateur operator's government for ITU Region II, except that the use of any repeater is permitted. The operator privileges, however, shall not exceed those privileges in ITU Region II of a Commission-issued Amateur Extra Class operator license. *See* Section 97.107(b) of the Commission's Rules, 47 C.F.R. § 97.107(b). The indicator included with the station call sign transmitted in the station identification required by Section 97.119 of the Commission's Rules, 47 C.F.R. § 97.119, shall be the appropriate letter-numeral designating the station location (W4 in Florida).

3. IT IS ORDERED that Section 97.501 of the Commission's Rules, 47 C.F.R. § 97.501, IS HEREBY WAIVED for alien amateur operators who are eligible as specified in paragraph 1 above for the period 0001 UTC August 27, 1989, to 2359 UTC September 16, 1989, in ITU Region II areas where the amateur service is regulated by the Commission.

4. IT IS FURTHER ORDERED that special temporary authorization IS HEREBY GRANTED for operation of amateur stations by eligible alien amateur operators who are also official delegates or official observers to the IARU Region II Conference for the time period specified in paragraph 3 hereof, provided that the conditions set forth in subparagraphs a. through d. of paragraph 1 are satisfied.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. USP-88-(W)-025

Petition for the Waiver of the International Settlements Policy to Reduce the Accounting Rate for International Direct Packet Switched Service Between the United States and the Federal Republic of Germany

ORDER ON RECONSIDERATION

Adopted: August 18, 1989; Released: August 29, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

A. AT & T Waiver Petition

1. On April 21, 1988, American Telephone and Telegraph Company (AT&T) filed a petition for waiver of the International Settlements Policy (ISP) to permit a reduction in the accounting rate for international direct packet switched service between the United States and the Deutsche Bundespost (DBP) in the Federal Republic of Germany (FRG), with a proposed effective date of June 1, 1988 (USP-88-(W)-025). Specifically, AT&T requested that we grant a waiver to permit the introduction of an accounting rate of SDR 2.85 per kilosegment and SDR 2.85 per hour of connect time, divided on a 50/50 basis, for international direct packet switched service between the United States and the Federal Republic of Germany. AT&T noted that the new rate would be a reduction of 14 percent from the current accounting rate of SDR 3.32 per kilosegment and SDR 3.32 per hour of connect time.

B. Order

2. On January 17, 1989, we adopted an Order[1] granting AT&T's petition for waiver. We noted that the Commission has traditionally required that all carriers providing the same service to the same foreign point have the same accounting, settlement, and division of tolls arrangement with a given PTT.[2] We also noted, however, that the Commission has provided a mechanism for consideration of requests for waiver of this uniformity requirement by individual carriers in an effort to encourage new entry by new competitors, lower prices and greater innovation in international telecommunications services. Moreover, we noted that the Commission has specifically stated that, in considering whether to grant such requests for waiver of the uniformity requirement, we could consider a variety of factors, including, but not limited to, the possibility of lower collection rates, improved services, and increased competition, [3] and that each of these factors alone could support a conclusion that a waiver would provide overall benefits to the public[4] and should be granted.

3. We considered the Commission's guidance in this area and concluded that the grant of the waiver request in the present case would promote the Commission's goals of encouraging new entry, competition, and innovation in the provision of international services and that these benefits, on balance, outweighed any procedural or substantive concerns expressed by TRT and FTCC. In addition, we noted a recent Bureau report[5] that was prepared in response to a Commission request to provide a recommendation on what, if any, action the Commission should consider proposing to lower international accounting rates for international telecommunications services originating or terminating in the United States.[6] Specifically, we noted that the *Bureau Report* concluded that the price of telecommunications services is an important determinant of demand and that accounting rates for international telecommunications services have not kept pace with reductions in international facilities costs. We also noted our view that in the specific context of packet switched communications service between the U.S. and the FRG, the market for this service should grow, particularly if reductions in the accounting rate result in reductions in collection rates on both sides of the Atlantic. Furthermore, we stated that should the reduction in the accounting rate lead to reductions in collection rates for packet switched service, there should be no appreciable negative impact on AT&T's revenues or on the U.S. telecommunications industry overall. To the contrary, we noted that accounting rate reductions could lead to revenue growth for this service.

4. We recognized, however, that some carriers may continue to have legitimate concerns that their share of inbound traffic volume from a PTT may not be proportionate to their share of outbound traffic to the FRG should they choose not to modify the existing rate to conform with the new and lower accounting rate. As a result, we conditioned the waiver grant on AT&T filing a revenue and traffic report showing originating and terminating minutes of use, messages, and revenues for packet switched service to and from the FRG for calendar year 1989 on or before August 1, 1990,[7] and made it clear that we would be prepared to consider additional action at a later date, if necessary.

II. SUMMARY OF PLEADINGS

A. TRT Petition

5. On March 1, 1989, TRT filed a petition for reconsideration of the *Order* stating that the lower accounting rate for international packet switched data services between the United States and the FRG will result in a significant reduction in the revenue contribution by the FRG and eventually other European countries to the cost of providing international packet switched data services and will ultimately unreasonably burden United States users.

6. TRT states that, unlike IMTS service, the predominant flow of international packet switched service traffic is inbound toward the United States. TRT argues that a reduction in the accounting rate level for packet switched service would, accordingly, result in cost reductions for

the U.S. carrier's foreign correspondents and equal reductions in the revenue for the U.S. carriers providing the service. TRT notes that, in this respect, the conditions under which packet switched data services are provided are similar to those under which international telex services are provided. TRT maintains that the ISP has been developed over the years largely within the context of the international telex service in which there is a significantly larger volume of traffic flowing toward the United States from foreign countries than there is traffic flowing from the United States toward foreign countries. TRT states that foreign administrations therefore benefit financially from telex accounting rate reductions and such reductions result in less revenue available to U.S. carriers.[8]

7. Furthermore, TRT asserts that accounting rates for packet switched data services are only a small fraction of applicable collection rates. TRT notes, for example, that the prior SDR 3.32 accounting rate for service between the United States and the FRG currently is equal to about $4.39 in U.S. currency.[9] TRT states that the outpayment to the terminal country accordingly is equal to about $2.20 per hour and per kilosegment. TRT notes that the reduced U.S./FRG accounting rate of SDR 2.85 is equal to about $3.77 with an outpayment to the terminal country of about $1.89 per hour and per kilosegment. In contrast, TRT explains that the applicable U.S. collection rates are $8.00 per hour of connect time and $10.00 per kilosegment.[10] TRT states that although the collection rates in the FRG are significantly lower, 9.00 DM (about $4.94[11]) per hour and per kilosegment, these rates are also significantly above both the prior accounting rate and the reduced accounting rate which the Bureau has approved.

8. TRT states that although the *Bureau Report* contains no information on the cost of providing international packet switched data services, the available public information suggests that even the higher prior accounting rate may be below the relevant cost of service and may be too low to adequately compensate the terminating carriers. TRT notes that on December 19, 1988, subsequent to the close of the pleading cycle in this proceeding, the operator of the largest U.S. packet switched data network, Telenet, filed public tariff rates for the domestic termination of international packet switched data transmissions on its network which became effective on January 2, 1989. TRT states that Telenet's rates for the domestic termination *only* of international packet traffic are $2.00 per connect hour and $2.00 per kilosegment. TRT explains that under the prior accounting rate, these rates leave the U.S. carriers only about $0.20 per connect hour and per kilosegment from the DBP's payout to recover their cost of international transmission and switching. TRT concludes that the DBP payout of $1.89 under the newly approved accounting rate is insufficient to even recover the cost of domestic termination.[12]

9. TRT also argues that the Bureau's delegated authority does not extend to permit it to revise the policies of the Commission and that even the Commission itself may not revise its policies promulgated in a prior Rule Making without undertaking further Rule Making proceedings. TRT asserts that the proper course of action under these circumstances would be to vacate the *Order* and to request that the Commission institute a further Rule Making to consider what modifications, if any, should be made in the ISP. TRT asserts that the *Order* shifts the burden of proof from the petitioner of a waiver to the opponent of a waiver and effectively rules that reductions in accounting rates for international telecommunications services are without exception in the national interest and, accordingly, all applications for ISP waiver to implement accounting rate reductions should be routinely granted. TRT states that the *Order* is a drastic departure from the Commission's previously enunciated policy and would, if followed in the future, almost completely nullify the ISP as a protection from foreign monopoly telecommunications administration "whipsawing" for those services, such as packet switched data and telex services, where the predominant flow of traffic is inbound toward the United States.

10. TRT claims that the *Order* does not make any findings of fact specifically relating to packet switched data services, packet switched data services between the U.S. and FRG, the financial impact upon U.S. interests of the accounting rate reduction proposed by AT&T, or the relationship of the existing and proposed accounting rates to collection rates and the cost for the specific services in issue. Instead, TRT claims that the total rationale for the grant of ISP waivers to AT&T and other carriers appears to rest solely on a *Bureau Report* issued subsequent to the close of the pleading cycle in this proceeding.[13]

11. TRT states that the Bureau now apparently believes that its *Bureau Report* contains new information and enlightenment which should require modification of the ISP as enunciated by the Commission. TRT notes that the *Bureau Report* appears to conclude that IMTS accounting rates are too high and are a barrier to lower collection rates because (1) the level of IMTS accounting rates have not been changed for many years; (2) IMTS accounting rates are excessive in comparison to U.S. collection rates and an inordinate percentage of U.S. outbound IMTS revenues are paid to foreign correspondents; and (3) IMTS accounting rates appear to be excessive in relation to costs. TRT states that from the *Bureau Report*, one could reasonably conclude that reductions generally in IMTS accounting rates are justified and that such IMTS accounting rate reductions would significantly benefit U.S. users.[14] TRT argues that there is absolutely no basis in the *Bureau Report*, however, to support the apparent conclusion in the *Order* that every proposed accounting rate reduction for any international telecommunications service would benefit U.S. ratepayers, and specifically, that none of the conclusions in the *Bureau Report* are true in the case of international packet switched data services. TRT notes that there is not even one mention of packet switched data reports in the entire 118 page Report. TRT states that, to the contrary, the reasoning, which lead the authors of the *Bureau Report* to conclude that IMTS accounting rate reductions would benefit the public, would lead to the opposite conclusion with respect to packet switched data service accounting rates, in light of the diametrically different conditions under which that service is provided.

12. TRT asserts that the Bureau's conclusions in support of the grant of waiver are that, although the proposed accounting rate reduction will materially lessen the revenue contribution of the DBP to the provision of the services, the U.S. carriers will make up this loss by an increase in volume. TRT explains that implicit in this conclusion are a number of assumptions: (1) that the accounting rate reduction will result in collection rate reductions; (2) that the price elasticity of demand for the service is so high that the anticipated price reductions will result in sufficient additional traffic to make up for both

the revenue loss from the collection rate reductions themselves and the revenue contribution loss to the U.S. carriers resulting from the accounting rate reduction; and (3) that this increased volume of traffic can be handled by the U.S. carriers without a corresponding increase in their cost.

13. TRT argues that there is no basis for the Bureau's first and most basic assumption, that the accounting rate reduction will result in collection rate reductions. TRT argues that the reduction in DBP's revenue contribution resulting from the accounting rate reduction will, to the contrary, make it more difficult for the U.S. carriers to reduce their rates and may ultimately require them to increase their rates. TRT asserts that although the accounting rate reduction will lower the DBP's cost of service, the DBP has not indicated that it intends to pass these cost savings to its German users. Moreover, TRT notes that both the U.S. carriers and the DBP are required to pay out only a small percentage of their collection revenues for the foreign termination of U.S.-FRG packet switched data transmissions. TRT states that unlike the circumstances in the IMTS service where the U.S. IMTS carriers must pay out more than 75% of their collection revenues to foreign correspondents, the existing U.S.-FRG accounting rate level has not been a barrier to rate reductions. TRT concludes that there is no reason to anticipate that the accounting rate reduction will have any effect in producing rate reductions.

14. TRT notes that it is unaware of any studies that have accurately calculated the price-elasticity of demand for U.S.-FRG packet switched data services. TRT notes that neither the record in this proceeding nor the *Bureau Report* have referenced such a study. TRT argues that without this information it is pure speculation for the Bureau to predict that unspecified rate collection rate reductions will produce any additional revenue and to predict that such rate reductions will likely result in more than enough additional revenues to offset the loss of revenues from the DBP for the termination of packet switched traffic in the United States. Moreover, TRT contends that even assuming that the price-elasticity of demand for this service is such that collection rate reductions will stimulate significant additional traffic and revenue, as long as the predominant traffic flow for this service continues to be westbound from the FRG to the United States, an accounting rate reduction will nevertheless be inimical to the interests of the United States. TRT adds that the loss to the U.S. industry from the lower DBP payouts would increase in proportion to increases in demand for service from the FRG to the United States.

15. TRT asserts that while the United States, because of considerations of fairness and comity, should not insist on maintaining an unreasonably high accounting rate merely because it may be in the United States' financial interest to do so, there is no evidence that the SDR 3.32 accounting rate is unfair to the DBP or that it provides excessive compensation to the U.S. carriers for the termination of FRG originated traffic in the United States. TRT submits, however, that the Bureau is able to mathematically calculate the magnitude of this revenue transfer from the traffic data which it has collected from the U.S. carriers for this proceeding but has chosen to ignore the data in this proceeding, and that there is no evidence in this proceeding which would indicate that a substantial reduction to SDR 2.85 is justified at the present time. Indeed, TRT notes that all indications are that even the higher SDR 3.32 rate may not provide adequate compensation to the U.S. carriers.

16. Finally, TRT states that the principle harm to U.S. users from the accounting rate reduction results from the reduced DBP revenue contribution in total for the maintenance of this service which will require U.S. users in the future to pay higher rates for this or other services than otherwise would be necessary. TRT maintains that the reporting requirements provided for in the *Order* clearly do nothing to prevent this loss of revenues to the total U.S. industry and, therefore, afford no protection to the U.S. public. TRT states that although the Bureau states that it might take some future action after the receipt of these reports in the latter part of 1990, the Bureau does not indicate what it would or could do at that late date or what information in the reports could trigger such action. TRT asserts that presumably, the reports are intended to permit the Commission to detect whether the DBP had changed its routing of traffic to the United States among the U.S. carriers in response to the accounting rate reduction. TRT contends, however, that since the other carriers will be under pressure also to adopt this reduced accounting rate, that it is probable that the DBP will have no financial incentive to reroute its traffic. Moreover, TRT states that even if all carriers do not go along with the reduced accounting rate, the disincentive to such rerouting provided by the reporting requirement will only continue through the end of this year.

B. AT & T Opposition

17. AT&T opposes TRT's petition for reconsideration and asserts that TRT's claims are without merit. AT&T states that the Bureau's assumption that a lowered accounting rate will probably lead to lowered collection rates is a reasonable conclusion, supported by record evidence, and by TRT's submission in another proceeding.[15] AT&T thus argues that there is no support for TRT's argument that since collection rates are high relative to accounting rates, accounting rate reductions will not bring about price reductions.

18. AT&T suggests that the Bureau should flatly reject TRT's argument that lower accounting rates are contrary to the ISP when collection rates are so high relative to accounting rates that they may rise faster than they fall as a result of accounting rate reductions. AT&T maintains that TRT's argument is nothing more than an admission that it is satisfied with the present high level of rates. AT&T states in its reply that it intends to lower, not raise, its price as the result of the accounting rate reduction. AT&T contends that the Bureau's conclusion that lowered accounting rates will likely lead to lower collection rates is rational --irrespective of the flow of traffic -- and is supported by the record and by TRT's own - albeit unsuccessful - submission in another proceeding in support of lower accounting rates on telex service.[16]

19. AT&T states that the *Order* is entirely consistent with the Commission policy that contemplates grant of waivers likely to lead to lowered collection rates, unless there is evidence of "whipsawing." AT&T states that even if the current net inbound flow were a constant of U.S.-FRG service as TRT apparently assumes, AT&T maintains that lower accounting rates would have beneficial effects, including encouraging new entry. AT&T notes that the Commission has expressly found in CC Docket

86-494 that high accounting rates adversely affect new entry by raising new entrants' costs of delivering outbound traffic.[17] Furthermore, AT&T notes that the Commission has expressly found that new entry tends to lower price levels.[18]

20. AT&T states that, in any event, the direction of imbalance is not a constant, and could change if American carriers lowered prices significantly, in conformity with the primary purpose of the ISP - to approximate more closely the DBP's pricing levels. AT&T maintains that if prices were lowered and stimulation occurred to the extent that the net traffic flow was outbound, the accounting rate level would affect the cost floor and limit pricing flexibility. AT&T states that these propositions establish the nexus between lowered accounting rates and lowered collection rates.[19]

21. AT&T contends that TRT seeks to reimpose the old "single-factor waiver evaluation" standard – that is, would the proposed accounting rate change result in an immediate increase or decrease in the total revenue accruing to the U.S. carriers. AT&T observes, however, that the Commission has expressly moved away from that standard and argues that the United States should not adopt the blatantly one-sided approach suggested by TRT. AT&T argues that the result of such a parochial approach would be that accounting rates on almost all services would be stuck at current levels and the public interest would certainly suffer.

22. AT&T states that the *Order* evinces no policy of "automatic" grant of waiver petitions to lower accounting rates and instead represents an *ad hoc* evaluation of a proposed accounting rate change. AT&T states that neither did the Bureau reverse the burden of proof in this proceeding. AT&T argues that it had, and bore, the burden of proof in its successful petition by demonstrating the lack of whipsawing and that lowered accounting rates would lead to lowered collection rates. AT&T notes that it also asserted that it was a new entrant and that its service was different and more beneficial to customers in that they control carrier selection, rather than the PTT. AT&T states that the Bureau, therefore, might well have granted the waiver on the alternate grounds of increased competition or improved service.

23. AT&T argues that TRT misreads the *Order* when TRT concludes that the Bureau has created a rule of general applicability. Rather, AT&T notes that the Bureau looked at AT&T's specific application for a lowered accounting rate on direct packet switched service to the FRG, and granted a waiver with specific reporting conditions limited to that specific service. AT&T states that the Bureau - in competitive fairness - granted similar waivers to any other carrier subject to the higher accounting rate on that specific route and service; and that its action was not the carte blanche grant for all lowered accounting rate applications in the future. Indeed, AT&T agrees that a policy establishing a grant of automatic ISP waivers whenever a lower accounting rate is sought would indeed be contrary to the ISP and the public interest. AT&T states that absent evidence of whipsawing, or of other public detriment, accounting rate reductions should be permitted because the public interest in lowering prices will be fostered. AT&T concludes that if whipsawing exists, however, the U.S. Government should step in to protect national interests.

24. AT&T states that in this instance there is no doubt that collection rates for packet switched service to and from Germany could be lower.[20] AT&T notes that even TRT concedes that the DBP's rates on this service are "significantly lower" than U.S. carrier's rates, despite the absence of competitive pressure on rates from the FRG and payment of the current accounting rate on imbalanced minutes. AT&T states that its agreement to lower a settlement rate is a recognition of the inevitable process of competition that drives rates to costs. AT&T argues that the *Order* will foster AT&T's ability to price competitively by lowering the accounting rate which is clearly a component of the price charged customers - thus fostering a clear purpose of the ISP. Hence, AT&T maintains that, properly read, the *Order* in this proceeding is not in "diametric opposition" to the ISP. AT&T notes that the Commission has held that "uniformity is not an end in itself," rather, the "primary goal" of the ISP is to lower prices to the American consumers. It further notes that the Commission found that it is better to get away from using the term "uniform" and call the policy the "international settlements policy", thus regarding it as an "antiwhipsawing policy." Indeed, AT&T argues that a high collection rate level should therefore be a goad to action under the ISP, not an excuse for maintaining the *status quo*, as TRT suggests. AT&T concludes that for the above-mentioned reasons, the Commission has explicitly stated that waivers may be granted even if the sole benefit to the public is, for example, lowered collection rates, so long as the benefit is not outweighed by countervailing considerations.[21]

C. Reply of TRT

25. TRT notes that in AT&T's Opposition, AT&T agrees with TRT that automatic grants of ISP waivers anytime a lower accounting rate is sought would not serve the public interest. TRT argues, however, that AT&T also asserts that new entry would be encouraged by reduced accounting rates even if the prevailing flow of traffic is inbound, and that for this proposition to be valid, it would be equally applicable to all other communications services. TRT maintains that the Commission did not consider that the improved ease of entry, which generally results from every accounting rate reduction, justifies ISP waiver or it would have established a general exception for accounting rate reductions when it promulgated its ISP policy.

26. TRT alleges that any improvement in the ease of entry that might result from the specific accounting rate reductions approved by the Bureau in this case would be, at most, negligible. TRT notes there are at present seven U.S. carriers providing packet switched data services between the U.S. and FRG. TRT states that it is apparent that the prior SDR 3.32 did not provide a significant barrier to entry and that the service is already being provided in the United States under fully competitive conditions. Accordingly, TRT submits that there is no reason to anticipate that the proposed accounting rate reduction to SDR 2.85 would have any noticeable impact upon competitive conditions in the United States.

27. TRT states that AT&T is able to refer only to unsupported generalities in its prior Reply in this proceeding and to equally unsupported generalities in a prior unsuccessful TRT petition in another proceeding[22] as support for its assertion that accounting rate reductions are conducive to U.S. collection rate reductions even where the predominant flow of traffic is inbound. TRT submits

that such unsupported speculations and generalities, whether uttered by AT&T or TRT, are not sufficient to justify the grant of waiver of the Commission's policies.

28. TRT adds that for the first time AT&T expressed its intent to reduce its collection rates for this service, although AT&T does not reveal the level of the intended rate reduction or when it intends to implement it. TRT asserts that any collection rate reduction could be implemented without an accounting rate reduction since payout requirement to the DBP even under the prior accounting rate was only 22% of its kilosegment collection rate.

29. TRT argues that AT&T is engaging in pure speculation when it argues that the direction of imbalance of traffic is not constant and could change if the American carriers lowered prices significantly, and that to the extent that the net traffic flow was outbound, the accounting rate level would affect the cost floor and limit pricing flexibility. TRT notes that the present flow of traffic is not outbound, it is inbound, and there is no reason to expect this to change in the foreseeable future.

30. Moreover, TRT alleges that even if the United States collection rates were to be significantly reduced, it is most likely that this would not materially alter the direction in the flow of traffic for this service. TRT notes that packet switched data services are particularly efficient and cost effective, in comparison to other alternative services, to access data bases. TRT argues that because the data bases of most interest to users throughout the world are located in the United States, the use of international packet switched data services has been predominantly inbound toward the United States and is likely to remain so irrespective of the relative collection rates in the United States and foreign countries.

31. TRT contends that although a reduction in U.S. collection rates to a level below the collection rate level in FRG could affect the flow of traffic in the future, an accounting rate reduction under the present circumstances is counter-productive to reductions in U.S. collection rates. TRT notes that AT&T is a new entrant for packet switched data services between the U.S. and FRG and apparently at present its outbound traffic from the U.S. exceeds its inbound traffic terminating in the United States. TRT further notes that AT&T, like the DBP, benefits from lower accounting rates for this service. TRT alleges, however, that the long-term interests of United States users are not furthered by the benefiting of one U.S. carrier at the expense of the U.S. industry as a whole. TRT states that it is obvious as elementary arithmetic that the accounting rate reduction in this instance will result in a smaller revenue contribution from the DBP toward the revenue requirements of the United States industry as a whole and that this will make it more difficult for the U.S. carriers to reduce their collection rate and may ultimately require them to increase their rates. Therefore, TRT argues that although the proposed accounting rate reduction will reduce AT&T's cost of service somewhat in the short-run, the accounting rate reduction will result in a much larger transfer of revenues from the United States industry in total to the FRG administration which would, over the long-run, require United States users to pay higher rates than otherwise necessary. TRT concludes that the short-run benefit for United States users resulting from the Commission's grant of AT&T's waiver in this proceeding would thus be purchased at much too high a price.

32. TRT notes that AT&T also argues that it has shown that the lower accounting rate is not the result of "whipsawing" by DBP and that TRT has not claimed "whipsawing" in this matter. TRT states that it is apparent from this argument that AT&T either does not know what "whipsawing" is or that it would have that term defined so narrowly so as to emasculate the ISP. TRT alleges that "whipsawing" does not occur only in extremely rare instances where the PTT blatantly and specifically threatens the United States carriers with adverse consequences unless they acceded to its will. TRT argues that "whipsawing" in this limited sense is clearly not a prerequisite for the Commission to determine that ISP waiver should be denied. Rather, TRT contends that the Commission in the past has correctly determined to deny waiver in situations like this where the grant thereof would place the United States carriers in a position which makes them vulnerable to "whipsawing."

33. TRT states that in this instance, AT&T has not described the negotiations with the DBP which lead to AT&T's agreement to a reduced accounting rate. TRT alleges that all that is known is that DBP agreed to interconnect with the seventh United States carrier, AT&T, for the provision of packet switched data services between the U.S. and FRG, but at a lower accounting rate than had been established with other U.S. carriers already providing this service. TRT states that although there is no reason to doubt AT&T's word that its negotiations with DBP did involve any explicit threats or promises which led AT&T to accept the lower accounting rate, nevertheless such negotiations resulted in a situation which is very conducive to further whipsawing. TRT argues that AT&T has agreed to an accounting rate which is lower than that applicable with the other United States carriers and which, when applied to the total traffic between the U.S. and the FRG, would be significantly more beneficial to the DBP than the prior accounting rate. TRT maintains that since the DBP has the ability to favor one U.S. carrier over another with respect to such things as operating arrangements and return traffic distribution, it is clear that, even in the absence of overt threats, the other U.S. carriers will be under almost irresistible pressure to agree eventually to this lower accounting rate. TRT submits that the purpose of the ISP is to prevent this kind of situation which has a strong potential for whipsawing.

34. TRT asserts that it does not argue that there should be a single factor evaluation standard, but that the financial impact of a waiver request upon the U.S. industry should be a very important factor and the starting point in the consideration of whether a grant of waiver is in the public interest. TRT argues that where the impact of the grant of waiver is positive upon the U.S. industry, the waiver should normally be granted. TRT adds that where the grant of waiver will have a significant negative financial impact on the U.S. industry, waiver should be granted only when there is a strong showing of other public interest factors which are sufficient to counter-balance the negative financial impact. TRT states that AT&T, on the other hand, would have the Bureau treat financial impact as an insignificant consideration that is outweighed by even unsupported generalized claims of offsetting public interest benefits.

35. In summary, TRT states that it has not argued that accounting rate reductions which adversely impact the financial position of the United States can never be justified. Rather, TRT claims it has argued that the specific

accounting rate reduction proposed by AT&T in this proceeding has not been justified. In this regard, TRT maintains that it has shown that the prior accounting rate was already significantly lower than the collection rates, both in the United States and in the FRG. TRT adds that it has also shown that on the basis of the best available evidence of the cost of this service (i.e., the rates of the U.S. carriers established in a competitive market) even the higher SDR 3.32 accounting rate may not provide adequate compensation to the U.S. carriers for the termination of traffic.

III. DISCUSSION

36. Section 1 of the Communications Act of 1934 provides that the Commission shall regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."[23] The Commission has sought to comply with this statutory mandate by establishing a competitive market structure in telecommunications as the most effective means of ensuring that U.S. telecommunications resources are developed and employed in ways that further the Act's efficiency, equity, and national security goals. Specifically, the Commission has stated that competition benefits the public when it maintains or improves a good service and enhances the economical and efficient provision of communications services.[24] Furthermore, the Commission has explained that the hallmark of a competitive market is the maximization of customer choice which can be effectuated by allowing multiple entrants.[25] With the power of choice, customers are better able to influence the types of services available simply by frequenting one service provider over another. This market pressure not only encourages service providers to be responsive to customer needs, but also encourages them to lower the price of their services in order to obtain a larger share of the market and to maximize profits by offering service in the most efficient and economical manner.[26]

37. The Commission has recognized, however, that in the context of the provision of international common carrier services there is a possibility that foreign telecommunications administrations that possess a monopoly for the provision of telecommunications services in their home markets would be able to obtain unduly favorable terms and conditions from U.S. international service providers by setting U.S. carriers against one another in a process referred to as "whipsawing." Specifically, the Commission has generally required that carrier operating agreements with their foreign correspondent stipulate: uniform accounting rates, uniform terms for the sharing of tolls, and uniform settlement rates. The Commission has made it clear, however, that the ISP exists to protect the U.S. public interest by helping U.S. carriers to resist pressure to make concessions that may ultimately be detrimental to *U. S. ratepayers*. The Commission has emphasized that the ISP is designed to protect U.S. ratepayers, *not* U.S. carriers.[27]

38. In this context it is important to note that the Commission proposed in 1977 to consider individual departures from these uniformity requirements based on a *prima facie* test that would essentially rely on whether any savings would be realized by the U.S. carriers generally from any proposed settlement rate reduction.[28] In 1980, however, the Commission declined to adopt the *prima facie* test and made clear that a variety of factors existed that could support the grant of a waiver of the uniformity requirement, including lower collection rates, improved services, and increased competition.[29] Subsequently, in 1986, the Commission reemphasized that the public interest requires facilitating the development of a competitive marketplace characterized by lower collection rates and greater service/carrier options for users and that the Commission's settlement policy should recognize the potential value of non-conformity. As a result, the Commission again declined to specify rigid rules or a *prima facie* test to govern the grant of waivers. In this decision, the Commission added that the size - or lack of market power - of the carrier was an additional factor to be considered in the analysis of waiver requests.[30]

39. With these Commission decisions and policy guidelines in mind, on January 17, 1989, the Bureau granted AT&T's request for a waiver of the Commission's ISP to permit a reduction in the accounting rate for international direct packet switched service between the United States and the Federal Republic of Germany. Specifically, we concluded that the reduction would promote the Commission's goals of encouraging new entry, competition, and innovation in the provision of international services, and that these benefits, on balance, outweighed any procedural or substantive concerns expressed by the commenting parties.

40. In this order on reconsideration, we reaffirm our decision to grant AT&T's waiver. We believe that TRT's argument - that a significant reduction in revenue contribution by the FRG, and eventually other European countries, to the cost of providing international packet switched data services will ultimately unreasonably burden U.S. users - is nothing more than a request that we use the *prima facie* test, rejected by the Commission in 1980 and again in 1986, in our consideration of waiver requests. This clearly would be inappropriate and we deny in full TRT's request. Indeed, contrary to TRT's assertions, we believe that not only is the grant of AT&T's waiver request for public packet switched service to the FRG fully consistent with the Commission's direction that we use a variety of factors, rather than a *prima facie* test, in evaluating waiver requests, but that this specific grant of waiver is also fully consistent with the Commission's more recent decisions to tailor the ISP to the specific nature of the market for various international telecommunications services.[31]

41. We believe that the record in this proceeding, the *Bureau Report*, and TRT's pleading in several other proceedings[32] demonstrate that collection rates and accounting rates for the provision of international telecommunications services, including international public packet switching service, may have an important effect on the demand for such services and the efficient use of national and international telecommunication resources. Moreover, while we recognize that this new and lower accounting rate may be insufficient to cover TRT's termination costs, we also recognize that TRT could simply choose to discontinue receiving such terminating traffic.[33] Furthermore, we believe that our decision to grant a waiver for the provision of public packet switched service between the U.S. and the FRG will not only create greater incentives for more efficient use of the U.S. domestic telecommunications infrastructure, but will create greater

incentives for the introduction of U.S. collection rates for service to the FRG that more closely approximate the collection rates charged by the DBP for service to the United States.[34] Indeed, to the extent that there remained any doubt after the adoption of our *Order* that this particular grant of waiver for the provision of public packet switched service to the FRG serves the public interest, we believe that AT&T has removed that doubt by making it clear that it intends to reduce its collection rates for public packet switching service to the FRG.

42. In our view, TRT's petition simply serves to highlight the need for continued flexibility in the application of the international settlements policy in individual circumstances such as the provision of international public packet switched services between the United States and the Federal Republic of Germany. We agree with AT&T's assessment that TRT's arguments are nothing more than an admission that TRT is satisfied with the *status quo*, including a collection rate for public packet switched service to the FRG that is roughly twice as high as the collection rate charged by the DBP for service to the United States.[35] Moreover, we agree with AT&T's assertion that TRT's own statements demonstrate the existence of significant price elasticities for international public packet switched service.[36]

43. Finally, while we recognize that TRT's previous position with regard to telex service with the CEPT countries[37] may prove to be correct,[38] we disagree with TRT's assertions that our grant of waiver for the provision of public packet switched services between the United States and the FRG would automatically apply to other services.[39] To the contrary, carriers must continue to file individual waiver requests for specific accounting rates for services covered by the ISP as provided for by the Commission. As stated in our waiver grant, however, in the interest of competitive fairness, we will not require additional carriers to file additional waiver requests in order to reduce the accounting rate for public packet switched service between the United States and the FRG to 2.85 SDR per kilosegment or 2.85 SDR per hour of connect time divided on a 50/50 basis. In order to address what we view as a very limited possibility[40] that the DBP would use this as an opportunity to whipsaw U.S. carriers by reallocating return traffic, however, we reaffirm our requirement that AT&T, and any other carriers that use this opportunity to lower the accounting rate, file a traffic and revenue report for calendar year 1989 on or before August 1, 1990.[41] Furthermore, while we believe that this approach provides adequate protection against the possibility of whipsawing and provides U.S. carriers with an opportunity to reduce their collection rates to a level down to DBP collection rates to the U.S., we will also reaffirm our determination that as an additional safeguard we should be prepared to consider additional action at a later date, if necessary.

44. In conclusion, we find that AT&T has provided sufficient evidence that a lower accounting rate for packet switched service between the United States and the FRG will benefit U.S. consumers - through a lower accounting rate and an increase in the competitiveness of the international packet switched market. Thus, we find that AT&T's waiver fits within the existing parameters of the ISP and the waiver factors discussed in the Commission's ISP decisions. As a result, we reaffirm our conclusion that we have acted within our delegated authority in this proceeding.

IV. ORDERING CLAUSES

45. Accordingly, IT IS ORDERED, that our decision to grant a petition for waiver of the international settlements policy filed by American Telephone and Telegraph Company to permit a reduction in the accounting rate for packet switched data services between the United States and the Federal Republic of Germany is AFFIRMED IN FULL and that the TRT Petition for Reconsideration of our decision is DENIED IN FULL.

46. This Order on Reconsideration is issued under Section 0.291 of the Commission's rules and is effective upon release. Applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this Order on Reconsideration (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] In the Matter of American Telephone and Telegraph Company, Petition for Waiver of the International Settlements Policy to Reduce the Accounting Rate for International Direct Packet Switched Service Between the United States and the Federal Republic of Germany, File No. USP-88-(W)-025, DA-47, 4 FCC Rcd 1195 (*released* January 30, 1989)(hereinafter *Order*).

[2] *See* Implementation and Scope of Uniform Settlements Policy for Parallel Communications Routes, CC Docket No. 85-204, 51 Fed. Reg. 4736, para. 3 (1986)(hereinafter *Report and Order*).

[3] *See* Uniform Settlement Rates, Memorandum, Opinion and Order, 84 FCC 2d 121 (1980)(hereinafter *Uniform Settlement Rates)* ; *see also* Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes, Notice of Proposed Rule Making, CC Docket No. 85-204, 50 Fed. Reg. 28418 (July 3, 1985); *Report and Order*, *supra* n. 2.

[4] *Report and Order* at para. 3.

[5] *See* "International Accounting Rates and the Balance of Payments Deficit in Telecommunications Services," Report of the Common Carrier Bureau to the FCC (December 12, 1988) *(hereinafter cited as Bureau Report). See also* Kenneth B. Stanley, "Balance of Payments Deficit in International Telecommunications Services," Industry Analysis Division, Common Carrier Bureau (December 12, 1988).

[6] *See* Regulatory Policies and International Telecommunications, Report and Order and Supplemental Notice of Inquiry, CC Docket No. 86-494, 53 Fed. Reg. 12546 (1988).

[7] We stated that we would not require that other U.S. carriers that wish to reduce their accounting rate to SDR 2.85 per kilosegment and SDR 2.85 per hour of connect time for packet switched service to and from the FRG file additional petitions for waiver. Rather, we stated that we would permit other U.S. carriers to establish this accounting rate by filing a letter with the Chief of the Common Carrier Bureau, that notifies the Commission of the effective date of the rate (which must be after the effective date of the *Order)*. We noted that carriers availing themselves of this opportunity, however, would be sub-

ject to the same condition that they submit a revenue and traffic report on their packet switched traffic to and from the FRG for the calendar year 1989 on or before August 1, 1990.

[8] In this context, TRT argues that the *Bureau Report* contains two observations with respect to telex that may be the only information in the Report relevant to the issues in this proceeding. First, TRT notes that the Report shows that the balance of payments surplus from telex declined from $20.5 million in 1984 to $8.2 million in 1987. TRT explains that although this decline was partly due to declining telex traffic volume, it was for the most part the result of accounting rate and settlement reductions. Second, the *Bureau Report* also notes that during the approximately same period there have been increases in U.S. telex collection rates. TRT submits that there is a connection between these two observations. TRT explains that certainly the loss to the U.S. industry of more than $12 million in the contribution to the telex service by foreign correspondents was a contributing factor to the financial conditions which necessitated increases in the U.S. collection rates.

[9] TRT explains that one SDR equals 1.32150 dollars as of 2-28-89 per International Monetary Fund, as reported in the *Wall Street Journal* on March 1, 1989.

[10] AT&T Tariff F.C.C. No. 4.

[11] TRT explains that one DM equals .5486 U.S. Dollars on 2-28-89 as reported in the *Wall Street Journal* on March 1, 1989.

[12] TRT notes that the above calculations were based upon the current abnormally low value of the dollar. TRT explains that the historical SDR/US Dollar relationship, which may be more appropriate in the long run, is one SDR = $1.2061. Under this historical conversion rate the reduced SDR 2.85 accounting rate would be only equal to $3.44 and DBP's payout would only equal $1.72 per hour and per kilosegment.

[13] *See Bureau Report, supra* n. 5.

[14] TRT states further that it believes that it would be stretching the data contained therein to conclude that all IMTS accounting rates should be reduced.

[15] AT&T cites TRT Petition for Waiver, File No. USP-87-013, filed December 17, 1986 (*hereinafter cited December 17, 1986 Petition*). *See* In the Matter of Petitions for Waiver of the International Settlements Policy to Reduce the Accounting Rate for International Direct Telex Service Between the United States and the CEPT Countries, Memorandum Opinion and Order, File Nos. USP- 87-005(W); USP-87-010(W); USP-87-013(W), 3 FCC Rcd 52 (released January 8, 1988)(hereinafter *CEPT Order*).

[16] Indeed, AT&T notes that in TRT's *December 17, 1986 Petition*, TRT alleged:

> "The proposed reduction in accounting rates will reduce the cost basis of eastbound traffic and is therefore conducive to reduction in collection rates. The competitive forces of competition will ensure that cost reductions are flowed through to the maximum extent economically possible." *December 17, 1986 Petition* at 5.

Significantly, AT&T points out that the flow of traffic in that case was also predominantly inbound, and the European carriers were "pressing" for reductions. *Id.* at 2.

AT&T notes that TRT in that proceeding sought an even lower rate than certain other carriers that were themselves seeking an accounting rate reduction. AT&T states that the other carriers' requests were granted but TRT's request was not because the Bureau was concerned with whipsawing by the European PTTs. *CEPT Order, supra* note 15 at para. 9.

[17] AT&T states that even if the prevailing flow is inbound, a new entrant may have an outbound flow, and would, therefore, have to pay DBP half of the accounting rate on imbalanced minutes.

[18] *Citing*, Puerto Rico Off Island Services, 2 FCC Rcd 6600, 6605 (1987); MTS and WATS Market Structure, 81 FCC 2d 177, 203 (1980). Moreover, AT&T argues that existing carriers, unable to make so much money on inbound calls, will probably price more competitively *outbound* calls to make up the lost inbound revenues and maximize profits. *See* Separate Systems, 101 FCC 2d 1046, 1065 (1985). AT&T notes that TRT argues that the reduction in accounting rate revenues could lead to carriers increasing rates. AT&T responds, however, that the competitive process tends to drive rates to costs. AT&T states that for that reason, price increases will probably not occur, unless rates are close to or below costs, without some subsidy from the current accounting rate. AT&T contends that that is hardly likely, because U.S. carrier rates are "significantly" higher than those the DBP charges without competitive pressure. AT&T notes that TRT alleges that the current accounting rate gives it no contribution to costs. *TRT Petition* at 19-20.

[19] Indeed, AT&T notes that TRT's own pleadings in this proceeding demonstrate the existence of significant price elasticities. DBP's rates are more than 60% of the "applicable U.S. collection rate" per hour of connect time and almost 50% per kilosegment. *TRT Petition* at 18. AT&T points out that, as a result, the DBP delivers 10 times the traffic to TRT that it receives. *Citing*, TRT's Opposition to AT&T's Petition for Waiver, filed May 25, 1988, at 1.

[20] AT&T notes that international packet switched service is provided on a streamlined basis by all U.S. carriers, in light of the Commission's conclusion that no carrier has monopoly power. Additionally, AT&T notes that no cost support data is required under the streamlined process; indeed, filed rates are presumed lawful. Moreover, AT&T states that although TRT suggests that even its higher accounting rate may be below the costs it incurs in terminating traffic, it makes no claim regarding AT&T's costs. Finally, AT&T adds that TRT's "proof" on the matter of costs is limited to situations like its own, in which high costs of delivery are a function of its reliance on another carrier to deliver traffic domestically.

[21] *Uniform Settlement Rates*, 84 FCC 2d at 126.

[22] *See December 17, 1986 Petition, supra* note 15. TRT notes that the Bureau in this proceeding, while denying TRT's petition, granted WUI's petition to implement a smaller accounting rate reduction under unusual circumstances. TRT asserts that WUI's petition followed discussion between the Chairman of the FCC and the French PTT in which the French agreed to reduce IMTS accounting rates benefiting the U.S. if the United States would agree to telex accounting rate reductions benefiting Europe. TRT argues that there is no such *quid pro quo* in this case. Moreover, TRT contends that the telex accounting rate reductions approved in that proceeding did not, in fact, result in reduced telex collection rates in the United States. To the contrary, TRT notes that United States telex collection rates were thereafter increased.

[23] *See* 47 U.S.C. Section 1.

[24] *See* FCC v. RCA Communications, Inc., 346 U.S. 86, 96-97 (1953); *see also* Telocator Network of America v. FCC, 69 F.2d 525 (D.C. Cir. 1982).

[25] The Commission has concluded in several contexts that, where feasible, competition would result in: the provision of telecommunications service at the lowest possible cost; a reduction in the waste of resources; increased responsiveness by carriers to the needs and desires of consumers; and quicker and

more efficient responsiveness by carriers to technical change and innovation. *See* MTS and WATS Market Structure, 81 FCC 2d 177, 202 (1980); International Relay, Inc., 77 FCC 2d 819, 824 (1980) *on recon.* 82 FCC 2d 41 (1981); Satellite Business Systems, 91 FCC 2d 941, 946-47 (1982); Western Union Telegraph Co., 91 FCC 2d 1051, 1061-63 (1982).

[26] *See , e. g.*, In the Matter of Establishment of Satellite Systems Providing International Communications, Report and Order, CC Docket No. 84-1299, 101 FCC 2d 1046 (1985).

[27] *Report and Order*, *supra* note 2, at para. 23.

[28] *See* Uniform Settlement Rates, Memorandum Opinion and Notice of Proposed Rule Making, Docket 21265, 66 FCC 2d 359, 365 (1977).

[29] *See* Uniform Settlement Rates, Memorandum Opinion and Order, Docket 21265, 84 FCC 2d 121, 126 (1980).

[30] *Report and Order supra* n. 2, at para. 40. The Commission stated that "it cannot agree to exempt such carriers from the terms of the (ISP), but we do feel a slightly more lenient application of the policy's requirements may be appropriate, in certain circumstances . . . . The size - or lack of market power - of the waiver proponent, as well as the carrier's traffic flow balances and the impact on other carriers of a grant of waiver, will therefore be included in the factors we consider in waiver request determinations." *Id.*

[31] The Commission has concluded, for example, that while voice service should be subject to the ISP, the nature of the international message telephone (IMTS) market makes a rigid application of the policy unnecessary and could serve to impede the development of competition in the IMTS market. As a result, the Commission has provided that absent showings of demonstrable detriment to the U.S. public interest or abuse of the uniformity requirement, grants for waiver would be expected to fall within the context of a semi- automatic grant approach. *Report and Order*, *supra* note 2, at para. 36. Moreover, the Commission declined to apply the procedural requirements of the ISP to the provision of international enhanced services. Subsequently, the Commission explicitly determined that the application of the ISP to enhanced services would not serve the public interest. *See* Implementation and Scope of the International Settlements Policy for Parallel Communications Routes, Further Reconsideration, CC Docket 85-204, 3 FCC Rcd 1614 (1988).

[32] In a recent petition to modify the telex accounting rate with India, for example, TRT argues that an accounting rate reduction can only serve to expand the size of the market by increasing traffic volumes and that such a result is in the public interest - even when the industry, as a whole, receives more traffic than it sends, thus creating a balance of payments deficit. Specifically, TRT asserts that the grant of an accounting rate reduction in that case will have only a *de minimis* economic effect on the entire telex industry while the increase in volumes, and the direct benefit to U.S. ratepayers resulting from lower collection rates, outweighs the potential harm to the industry resulting from a lower accounting rate. *See* In the Matter of TRT Telecommunications Corporation Petition for Waiver of the International Settlements Policy to Implement a Reduced Accounting Rate for International Telex Service Between the United States and India, File No. USP-89-(W)-037 (filed April 6, 1989)(hereinafter *India Petition).*

[33] *CEPT Order*, *supra* n. 15 at n. 10.

[34] Moreover, we note that the lower accounting rate proposed by AT&T may also provide opportunities for additional carriers to enter the packet switched market for traffic between the U.S. and the FRG, and that such a result would be in the public interest.

[35] *See supra* para. 18.

[36] *Id.* at n. 19.

[37] In that context, TRT argued that a lower U.S.-CEPT telex accounting rate would permit the CEPT administrations to reduce their collection rates and that such a reduction would improve the net settlement position of U.S. carriers, permitting a reduction in U.S. telex collection rates and stimulating demand for U.S. outbound telex service. *See CEPT Order*, *supra* n. 15 at 2.

[38] We also note that TRT is correct that telex is very similar to packet switching service in the sense that U.S. collection rates for service to Europe are often significantly higher than European collection rates for service to the United States. *See e. g.* Appendix M, Tariff and Accounting Rates for Telex Service Between the United States and Selected Countries, 1988, in K. Stanley, "The Balance of Payments Deficit in International Telecommunications Services," Industry Analysis Division, Common Carrier Bureau, FCC (December 12, 1988). In addition, we note that in contrast to other international telecommunications services the United States has a net inflow of settlements payments for telex, including a $21 million surplus with Europe in 1987. Nevertheless, even in the international telex market, where foreign telex collection rates exceed U.S. collection rates, the U.S. net settlements position may be exacerbated. For example, in 1987 the Japanese collection rate per minute for telex service from Japan to the U.S. was $4.22, while the U.S. collection rate for service to Japan was $2.67. *See* Appendix M *supra*. Notably, the U.S. has a net settlements deficit for telex service with Japan of $3.8 million in 1987. *Id.* at p. 38.

[39] We cannot agree with TRT, however, that there are any *quid pro quo* arrangements concerning reductions in accounting rates for IMTS and telex service with the CEPT countries. Indeed, in the specific instance of France, further reductions in the IMTS accounting rate with the United States have been implemented that lowered the U.S.-France IMTS accounting rate to 1.2 SDRs, despite the absence of any telex accounting rate reduction requests. *See e. g.*, Letter from D. Ritchie, General Attorney, AT&T, to Donna Searcy, Secretary, FCC (January 11, 1989).

[40] The information provided to us by the carriers demonstrates, as TRT's *India Petition* observes with regard to telex traffic with India, that the reduction will have a *de minimis* economic effect even under the negative scenario suggested by TRT.

[41] Section 43.61 reports do not provide information on the traffic flows of packet switched data services between the U.S. and the FRG and, therefore, such information must be separately reported. Moreover, data provided to us by the carriers currently providing packet swithced services between the United States and the FRG suggests that the market for this service is currently of a *de minimis* nature and that the benefits that might be gained from a longer term information reporting requirement is unlikely to outweigh the administrative costs associated with separately reporting such data. This is in accordance with the Commission's determination in the *Report and Order* that the need for governmental oversight of international settlement arrangements should be balanced with the need to minimize regulatory intrusion in complicated dynamic sector business operations. *See Report and Order* at para. 25.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications for
Transfer of Control of

Southern	File Nos. 1038-DSE-TC-88 (2)
Satellite	WK47, 1039-DSE-TC-88
Systems, Inc.	1551-CF-7C(2)-88

Licensee of earth stations Douglasville, GA and E7990, Atlanta, GA and Licensee of point-to-point microwave stations WCU578, Atlanta, GA and WLB957, Douglasville, GA; Tempo Television, Inc., Licensee of earth station E4599, Douglasville, GA

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 1989; Released: August 29, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 15, 1988, the Common Carrier Bureau granted authorization to transfer control of Southern Satellite Systems, Inc. (Southern Satellite) and Tempo Television, Inc. (Tempo) from Tempo Enterprises, Inc. (Tempo Enterprises) to Tempo Acquisition Co., a wholly owned subsidiary of Tele-Communications, Inc. (TCI).[1] The Wireless Cable Association (Wireless Cable) had filed comments in that proceeding requesting the Commission to impose conditions on any grant. The Common Carrier Bureau granted the application but declined to impose the conditions suggested by Wireless Cable. Wireless Cable is now requesting reconsideration of the Bureau's decision. As is discussed below, we deny the petition for reconsideration and affirm the Bureau's findings.

2. In its comments in the initial proceeding, Wireless Cable expressed concern that the proposed acquisition by TCI would adversely affect competition in the market for satellite delivered television programming. According to Wireless Cable, the transfer would result in the vertical integration of a large cable operator and two significant sources of programming. It claimed that this might limit access to programming by non-affiliated entities or might lead to discrimination in pricing. Wireless Cable also noted that TCI has been found guilty of antitrust violations in connection with the operation of one of its cable systems.[2] Wireless Cable did not request that we deny the transfer application, but asked the Commission to "consider whether there is a way to assure that such vertical integration will not lead to a denial of access to programming for retail competitors of TCI such as wireless cable."[3] It requested that we require TCI to provide assurances that it would sell programming to wireless cable firms at non-discriminatory prices.

3. The Common Carrier Bureau, in granting the application, found that Wireless Cable had not provided evidence of specific anticompetitive conduct that would warrant conditioning the transfer as proposed. The Bureau stated that both Southern Satellite and Tempo were common carriers and therefore were under an obligation to provide service in accordance with the requirements of Title II of the Communications Act. The Bureau also noted that in a separate proceeding, the Commission had recently found that price regulation of satellite delivered programming services is unnecessary at this time.[4] The Bureau concluded that Wireless Cable's unsupported allegations did not provide any basis upon which to reverse that conclusion.

4. Wireless Cable bases its Petition for Reconsideration on two arguments: 1) that the Bureau incorrectly stated that Tempo was a common carrier; and 2) that the Bureau incorrectly assumed that TCI had complied with the Commission's rules and regulations and therefore was qualified to control Commission licensees.

II. DISCUSSION

A. *Standing*

5. Initially, TCI argues that Wireless Cable's Petition for Reconsideration is procedurally defective because it does not meet the requirements of Section 1.106 of the Commission's rules. This rule requires that in order to have standing to file for reconsideration, a petitioner must be a party to the proceeding or, if not a party, demonstrate why it did not participate earlier.[5] TCI states that because Wireless Cable did not file a petition to deny the transfer of control application it is not a party. Moreover, TCI maintains that because Wireless Cable did not demonstrate why it was impossible for it to participate earlier, its petition for reconsideration should be denied. In reply, Wireless Cable asserts that it was, in fact, a party to the transfer proceeding by virtue of its filing comments and that it did not file a formal petition to deny or otherwise seek to block the transfer because it did not want to jeopardize the licensees' delivery of programming.

6. We find that Wireless Cable is a party to this proceeding and as such, is qualified to file a Petition for Reconsideration under Section 1.106 of the Commission's rules.[6] The purpose of Section 1.106(b) is to give finality to Commission decisions by preventing new parties from participating only in the later stages of a proceeding.[7] There is nothing in this rule that limits the definition of "party" to one who has filed a formal petition to deny. Wireless Cable filed comments[8] that suggest that the interests of its members are threatened by the transfer because the members will be less able to obtain programming. The allegations are sufficient to establish "a stake in the controversy"[9] and thus Wireless Cable became a party to this proceeding. We reject TCI's assertion that Wireless Cable is not entitled to file a petition for reconsideration.[10]

B. *Regulatory Classification*

7. With respect to issues raised in the Petition for Reconsideration, Wireless Cable first argues that the Bureau incorrectly stated that Tempo is a common carrier. Wireless Cable asserts that Tempo is not, in fact, a common carrier and therefore the complaint procedures in Title II of the Communications Act are not available to

protect wireless cable operators who are denied access to programming. According to Wireless Cable, Tempo has already discontinued some programming and replaced it with another service that may not be available to wireless cable systems. It argues that if Tempo were a common carrier, it would have to file a notice of discontinuance of service under Part 61 of the Commission's rules. Moreover, Wireless Cable asserts that even if the Title II complaint procedures were applicable, the process would only allow the recovery of monetary damages and would not adequately compensate wireless cable customers unable to receive programming.[11]

8. According to TCI, the Bureau's statement about the regulatory status of Tempo was not significant, especially in view of Wireless Cable's assertion that the common carrier complaint procedures were inadequate to provide relief in discrimination situations. It also states that Tempo is not operating as a common carrier.

9. When the Bureau granted the transfer application, it was based on the belief that both licensees -- Tempo and Southern Satellite -- were operating as common carriers. Commission records indicate that the earth station licenses granted to Tempo in 1982 are classified as common carrier licenses. On December 6, 1988, a letter was sent to the Commission addressing the regulatory status of the license issued to Tempo.[12] Attached to that letter was a copy of the original license application. The letter asserts that the Commission's designation of Tempo as a common carrier was in error. However, a review of the attached application indicates that Tempo[13] acquired the facility in question from Southern Satellite, which was and still is a common carrier. Furthermore, the license application states that unless otherwise noted, all information contained in Southern Satellite's original application for this facility is incorporated by reference in the new application. There is no reference in the application to any change in the regulatory status elected by Tempo and thus the license for this earth station was designated "common carrier" when it was issued in 1982. Tempo never informed the Commission that this designation was incorrect until it sent the above referenced letter in 1988, six years after the license was granted.[14] In addition, we have no record of an application to change that designation. If TCI is interested in changing that classification, it should file an application to do so. Until such an application is filed, Tempo is obligated to operate as a common carrier or face regulatory consequences.

10. Wireless Cable also argues that even if Tempo were operating as a common carrier,[15] the Title II complaint procedures are not sufficient to remedy its concerns, and its requested conditions are therefore warranted.[16] We disagree. First, remedies are available under Title II to protect Wireless Cable operators in the event of impermissible discrimination among the carrier's customers. Second, and irrespective of Tempo's common carrier obligations, Wireless Cable has not presented evidence of discrimination and we will not impose extraordinary conditions absent evidence that they are justified. As discussed below, we are not inclined to place unusual burdens on licensees based on the possibility of future abuses.

C. *Qualifications*

11. Wireless Cable's second argument in its petition is that the Bureau must reconsider its determination that TCI was qualified to control Commission licensees in light of statements made by TCI that in the past it had been fined for violations of Commission rules.[17] According to Wireless Cable, TCI should be required to submit further information about these violations. TCI states that because this evidence was before the Bureau at the time of its action, it is not new evidence and is not sufficient to warrant reconsideration of character qualifications.

12. With respect to TCI's character qualifications, Wireless Cable has never, either in the original application proceeding or on reconsideration, requested that the Commission deny the transfer application on any grounds. Thus, it has not raised TCI's character as an issue that would preclude grant of the application. It is therefore unclear why Wireless Cable devotes a substantial part of its argument to these allegations when the relief requested is not related to whether TCI is qualified. In granting the transfer, the Bureau's finding was that TCI's record as an earth station licensee was satisfactory and there was no evidence presented to indicate that it would conduct itself in an unfit manner in the future.[18] TCI's statements about rule violations were made in the context of a letter describing its performance. It stated that it holds over 1000 Commission licenses, none of which has been revoked or suspended, that it owns over 600 cable systems and that it has been fined fewer than six times for violations of rules.[19] This information does not warrant reevaluation of TCI's character qualifications to operate transmitting earth stations even if they were at issue here.

D. *Other Issues*

13. Essentially, the Wireless Cable petition urges the Commission to reevaluate its decision and condition the transfer based on the two arguments discussed above -- the regulatory classification of Tempo and the character qualifications of TCI. We are not persuaded, however, that our action in refusing to condition the transfer to TCI was incorrect.

14. TCI states that Wireless Cable, in asking the Bureau to regulate vertical integration between cable systems and program suppliers, is actually requesting a change in the Commission's rules without benefit of a Rule Making.[20] Wireless Cable denies that it is requesting the Commission to impose industry-wide regulation in this proceeding but only seeks to have conditions imposed on TCI's acquisition to protect wireless cable operators.

15. Wireless Cable has failed to offer any specific evidence to justify a finding that extraordinary conditions would serve the public interest. The Petition for Reconsideration cites a variety of opinions about TCI expressed in magazine articles without further corroboration or documentation.[21] The fact that TCI has been criticized in the press or in public statements, often by its competitors,[22] does not warrant a finding that it will engage in unlawful anticompetitive activity if allowed to acquire the licensees in question. Nor is Wireless Cable's statement that Tempo programming service has been discontinued and will be replaced by a service that "may not be available to all of the Wireless Cable industry"[23] sufficiently conclusive to warrant imposition of conditions. The fact that Tempo's programming service has changed does not substantiate Wireless Cable's speculation that any new service would not be available to its customers. There is simply not enough evidence presented by Wireless Cable to warrant a reversal of our decision and therefore its Petition for Reconsideration must be denied.

III. CONCLUSION

16. IT IS THEREFORE ORDERED that the Petition for Reconsideration filed by the Wireless Cable Association is denied.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Southern Satellite, Inc., 4 FCC Rcd 383 (1989). This order was effective on adoption. *See* DA 89-127 (released January 5, 1989).

[2] Central Tele-Communications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), *cert. denied*, 480 US 910 (1987).

[3] Comments at 11.

[4] Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, 3 FCC Rcd 1202, 1209 (1988). The Commission has recently begun an inquiry into whether discrimination exists in the provision of certain kinds of programming. *See* Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, 4 FCC Rcd 3883 (1989).

[5] 47 C.F.R. § 1.106(b)(1).

[6] 47 C.F.R. § 1.106.

[7] *See* Committee for Community Access v. FCC, 737 F.2d 74, 84 (D.C. Cir. 1984).

[8] TCI, in its opposition to the petition for reconsideration, asserts that Wireless Cable's comments were procedurally deficient. However, because we are denying the petition on substantive grounds, we do not need to reach this issue.

[9] *See* U.S. v. S.C.R.A.P., 412 U.S. 669, 687 and n. 14 (1974); *see also* Sierra Club v. Morton, 405 U.S. 727 (1972).

[10] The cases cited by TCI are not applicable because they involved situations where the entity filing the petition failed to participate in any manner in the initial proceeding.

[11] Wireless Cable also discounts the utility of the Commission's Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, *supra* n. 4, in providing any relief to its members.

[12] *See* Letter to Chief, Domestic Facilities Division from Pepper and Corazzini dated December 6, 1988.

[13] The original license grant was in the name of Satellite Program Network, Inc. (SPN), which was later changed to Tempo Television, Inc.

[14] When Tempo's predecessor, SPN, accepted this license, it also acceded to all of its conditions. *See* , *e. g.*, P&R Temmer v. FCC, 743 F.2d 918, 928 (D.C. Cir. 1984).

[15] There is no question that Southern Satellite, the other licensee involved in this transfer, is subject to regulation as a common carrier.

[16] Contrary to Wireless Cable's assertion, Tempo, as a domestic satellite licensee, would not be required to follow Part 61 discontinuance procedures, 47 C.F.R. Part 61, even if it were a common carrier. *See* Policy and Rules Concerning Rates for Competitive Common Carrier Service and Facilities Authorizations Therefor, Fourth Report and Order, 95 FCC 2d 554 (1983).

[17] These statements were made in a letter from John M. Draper, TCI Vice President and General Counsel, to the Commission dated November 30, 1988. This letter was in response to a request for further information by the Mass Media Bureau in connection with TCI's acquisition of broadcast licenses held by Tempo. These applications were later dismissed at the request of the applicant.

[18] *See* Order at n. 2. Still pending before the Commission is TEMPO Satellite, Inc.'s DBS application (File No. DBS-88-04) which directly raises the character qualifications of its parent company, TCI. The Mass Media Bureau is conducting further investigation of these character issues and the Commission will act on this information at a later date. *See* Letter from Chief, Mass Media Bureau to TEMPO Satellite Inc. dated August 2, 1989. *See* also, Continental Satellite Corporation, FCC 89-257 (released August 15, 1989).

[19] *See* Letter, *supra* n. 17 at para. 7.

[20] TCI cites Allnet Communication Services, Inc. 2 FCC Rcd 525 (1987) for the proposition that such action is not within the jurisdiction of the Common Carrier Bureau.

[21] *See* Petition at 3-5.

[22] *See* Petition at 4, n. 8.

[23] Reply at 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-96

In the Matter of

Amendment of the Commission's Rules
Relative to Allocation of the
849-851/894-896 MHz Bands

ORDER ACCEPTING LATE-FILED COMMENTS

Adopted: August 16, 1989; Released: August 30, 1989

By the Office of Engineering and Technology:

1. The Commission has received a *Motion To Accept Late Filed Comments* (*Motion)* in response to the *Notice of Proposed Rule Making (Notice)* in this proceeding, filed by the Goeken Group Corporation (Goeken Group). In support of the *Motion,* the Goeken Group asserts that on June 20, 1989, the Circuit Court of Du Page County for the 18th Judicial Circuit of Illinois found that the GTE Corporation had materially breached its Employment Contract, Non-Compete Agreement, and Stock Purchase Agreement with Mr. John D. Goeken. The Goeken Group further asserts that during the more than two years that Mr. Goeken was employed by GTE, he was precluded from filing proposals and amendments that would have materially benefitted the air/ground telephone industry. Therefore, the Goeken Group argues, it should now be allowed to file comments setting forth Mr. Goeken's plans for developing a competitive air/ground industry that will permit spectrum efficiency and improve service.

2. We believe the Goeken Group comments provide new and relevant information. Further, we recognize that it would have been impossible for these comments to have been filed in a timely manner in response to the *Notice*. Therefore, in order to develop as complete a record as possible in this proceeding, we are accepting the Goeken Group's comments and are allowing until October 9, 1989, for replies to these comments.

3. This action is taken pursuant to authority found in Sections 4(i), 302, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 302, and 303, and pursuant to Sections 0.31 and 0.241 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

QUALICOM MESSAGE CENTER, INC. File No. 28680-CD-P/L-01-88

For authority to construct and operate a new one-way facility on frequency 931.8375 MHz in the Public Land Mobile Service Naples, Florida

MEMORANDUM OPINION AND ORDER

Adopted: August 22, 1989; Released: August 30, 1989

By the Chief, Mobile Service Division:

I. BACKROUND

1. Qualicom Message Center, Inc. (Qualicom) and Pactel Paging, Inc. (Pactel) have each filed applications to construct and operate a one-way paging facility at Naples, Florida. Qualicom's application was filed on August 31, 1988, and listed on public notice on September 14, 1988. Pactel's application was filed on October 7, 1988. Both applications indicate a preference for frequency 931.8375 MHz.[1] Pactel has filed a "Petition to Dismiss or Assign Alternate Frequency" against Qualicom's application. Qualicom filed an opposition and Pactel filed a reply.

2. In its application, Qualicom states that it is applying for "a single additional one-way channel" and that the application should be granted without reference to traffic loading pursuant to Section 22.16(c)(2) of the Commissions rules. Qualicom had previously been granted a construction permit to build another one-way facility at Naples, Florida to operate on frequency 931.5625 MHz. As of the date Qualicom filed its current application, construction of the 931.5625 MHz facility had not been completed.

II. CONTENTIONS OF THE PARTIES

3. Pactel argues that Qualicom's application should be dismissed as defective for failure to meet the requirements of Section 22.16(c)(2) of the rules. Section 22.16(c)(2) states that "[a]pplications for a *single* additional one-way channel. . . will be acted on without reference to the loading on the applicant's existing system" (emphasis added). Pactel argues that Qualicom's unconstructed 931.5625 MHz facility constitutes a first one-way channel and that the current application is really an application for a *second* one-way channel. Pactel cites the statement in *Public Mobile Radio Service*, 97 FCC 2d 953, 954 n.2 (1984), that the Commission will only grant one additional frequency at a time. Pactel also argues that under Section 22.16(c)(2), and *National Page, Inc.*, 60 RR 2d 1472 (Comm. Car. Bur. 1986), applicants may not apply for additional channels until previously authorized facilities are constructed and in operation. Pactel, in the alternative, asks that the Commission staff assign frequency 931.8375 to Pactel and assign some other frequency to Qualicom.

4. Pactel, in the alternative, asks that the Commission staff assign frequency 931.8375 to Pactel and assign some other frequency to Qualicom. Pactel argues that the Commission must assign frequencies according to the public interest. Pactel argues that the disputed frequency should be assigned to Pactel because Pactel's proposed facility would be part of the company's statewide 931.8375 MHz paging system which could provide statewide paging service to Naples subscribers. Qualicom has no other 931.8375 MHz facilities. Pactel also argues that another frequency could be assigned to Qualicom without requiring any change in Qualicom's engineering or operating procedures.

III. DISCUSSION

5. Section 22.16(c)(2) states that "[a]pplications for a single additional one-way channel filed after January 1, 1986, will be acted upon without reference to the loading on the applicant's existing system."

6. In response, Qualicom argues that neither *Public Mobile Radio Service*, 97 FCC 2d 953, 954 n.2 (1984), nor Section 22.16(c)(2) of the rules, state that an applicant's previously authorized facility must be constructed before the applicant can apply for another one-way channel. Qualicom also asserts that *National Page* is inapplicable to the present case since *National Page* involved an application for an additional two-way channel for which a demonstration of need is required. Qualicom further responds that its application was filed first and that it is Commission practice to assign a disputed 900 MHz frequency to the first application filed.

7. We find that Qualicon's application can be granted under Section 22.16(c)(2). Neither Section 22.16(c)(2), nor *Public Mobile Radio Service*, 97 FCC 2d 953, 954 n.2 (1984), requires that applicants complete construction of previously authorized facilities prior to requesting an additional one-way frequency. Furthermore, we agree with Qualicom that the holding in *National Page* is not applicable here since *National Page* involved an application for an additional two-way channel, for which a need showing is required.[2]

8. We also reject Pactel's attempt to determine the assignment of frequencies in this case. Section 22.501(p)(2) states, in pertinent part, as follows:

> An applicant for a new, non-network frequency in the band 929-932 MHz will not specify a frequency in its application. It may specify its non-network frequency preference, but the Commission is not bound by such requests.

Thus, the Commission has determined that it is in the public interest that frequencies in the 929-932 MHz band be assigned by the Commission staff rather than selected by the applicants. *See First Report and Order*, 89 FCC 2d 1337, 1355-56 (1982). Both Pactel and Qualicom have indicated their frequency preference, as allowed under Section 22.501(p)(2). When two applicants indicate a preference for the same 929-932 MHz band frequency, the

Commission staff generally assigns the frequency to the applicant already operating other facilities on that frequency. We see no reason to deviate from our customary practice here.

9. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules that the application of Qualicom Message Center, Inc., File No. 28680-CD-P/L-01-88, IS GRANTED, AND ASSIGNED frequency 931.5125 MHz.

10. IT IS FURTHER ORDERED that the Petition to Dismiss or Assign Alternate Frequency IS DENIED.

11. This action is taken under Section 0.291 of the Commission's rules and is effective on the date of release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The frequency cannot be assigned to both applicants since the proposed sites are less than 70 miles apart. *See* Section 22.501(g)(3)(i) of the Commission's rules.

[2] In *National Page*, an application for an additional two-way channel was denied because of insufficient two-way traffic loading to justify the grant of another frequency. Under 22.16(a) of the rules, applicants for an additional channel on an existing two-way system must demonstrate need. National argued that it could not do a traffic loading study because it's "existing" station was still under construction when the application for an additional frequency was filed. The Bureau held that "[o]nce a construction permit has been granted for an initial [two-way] channel on a new station, an applicant for an additional channel to that station must" make the showing required by Section 22.16(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ORION NET, INC. File No. I-T-C-89-116

Application for authority to acquire
and operate facilities for service
between the U.S. and Italy and Spain.

ORDER AUTHORIZATION AND CERTIFICATE

Adopted: August 23, 1989; Released: August 30, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 1, 1989 by OrionNet, Inc., (OrionNet), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for the provision of its authorized common carrier services, including switched voice, on a direct basis between the U.S. and Italy and Spain. The application was placed on public notice on June 21, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to the Italy and Spain by OrionNet.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-116 IS GRANTED, and OrionNet is authorized to:

a. lease from Comsat and operate four voice-grade satellite circuits between its Shenandoah Court, Virginia earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits furnished by its correspondents in Italy and Spain;

b. lease and operate necessary domestic connecting facilities; and

c. use said facilities to provide OrionNet's regularly authorized services, including switched voice, between the U.S. and Italy (two voice-grade circuits) and Spain (two voice-grade circuits) and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between OrionNet and its correspondents in Italy and Spain, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1988).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-89-113

Application for authority to lease and operate facilities for direct service between the U.S. and Cyprus and Liberia.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 23, 1989; Released: August 30, 1989

By the Chief, International Facilities Division:

1. The above-captioned application filed by MCI Telecommunications Corp. (MCI) on June 1, 1989, requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S. and Cyprus and Liberia, and beyond. The application was placed on public notice on June 7, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision by MCI of direct service between Cyprus and Liberia.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-113 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 12 voice-grade satellite circuits between the Etam, WV earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Cyprus, furnished by MCI's correspondents;

b. lease from AT&T and operate 12 voice-grade circuits in the Etam, WV earth station;

c. lease and operate 12 voice-grade circuits between the Etam, WV earth station and MCI's West Orange, NJ operating center;

d. use said facilities in subparagraphs a, b and c above to provide MCI's regularly authorized services between the U.S. and Cyprus and beyond;

e. lease from Comsat and operate 12 voice-grade satellite circuits between the Andover, Maine earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Liberia, furnished by MCI's correspondent in Liberia;

f. own and operate 12 voice-grade circuits in the Andover, Maine earth station;

g. own and operate 12 voice-grade connecting circuits between the Andover, Maine earth station and MCI's West Orange, NJ operating center; and

h. use the facilities in subparagraphs e, f and g above to provide MCI's regularly authorized services between the U.S. and Liberia and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of a operating agreements between MCI and its correspondents in Cyprus and Liberia, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1988).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-89-117

Application for authority to acquire and operate facilities for service between the U.S. and India.

ORDER AND AUTHORIZATION

Adopted: August 23, 1989; Released: August 30, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 1, 1989 by American Telephone and Telegraph Co., (AT&T) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities to supplement its existing facilities used in providing service between the U.S. and India and beyond. The application was placed on public notice on June 21, 1989. No comments were received. Upon consideration of the application, we find that the present and future public convenience and necessity require a grant of AT&T's application.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-117 IS GRANTED, and AT&T is authorized to:

a. lease from Comsat and operate 180 voice-grade satellite circuits between the AT&T's earth station at Coram, New York and the 359^0 satellite, connecting with similar circuits between the satellite and an earth station in Bombay, India furnished by AT&T's correspondent in India;

b. lease from Comsat and operate 60 voice-grade satellite circuits between the east coast earth station and an appropriate INTELSAT AOR satellite, connecting with similar circuits between the satellite and an earth station in the United Arab Emirets (UAE) furnished by AT&T's correspondent in India;

c. lease and operate connecting facilities between the UAE earth station and the cable station at Fujairan, UAE and the UAE cable facilities between Fujairan, UAE and Bombay, India;

d. use said facilities to provide AT&T's regularly authorized services between the U.S. and India and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. This authorization shall be continued year-to-year unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1 106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT INTERNATIONAL, INC. File No. I-T-C-89-120

Application for authority to acquire and operate facilities for direct service between the U.S. and Chile.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 23, 1989; Released: August 30, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 12, 1989, by TRT International, Inc. (TRTI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for the provision of TRT's regularly authorized services, including switched voice telephone service, between the U.S. and Chile. The application was placed on public notice on June 28, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision by TRTI of direct service between the U.S. and Chile.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-120 IS GRANTED, and TRTI is authorized to:

a. lease from Comsat and operate six voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Chile furnished by TRTI's correspondent in Chile;

b. lease from AT&T and operate six voice-grade circuits in the Etam, West Virginia earth station;

c. lease and operate six voice-grade circuits between the Etam, West Virginia earth station and TRTI's New York operating office; and

d. use said facilities to provide TRTI's regularly authorized services, including switched voice telephone, between the U.S. and Chile and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRTI and its correspondent in Chile, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1988).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-89-128

Application for authority to lease and operate facilities for direct service between the U.S. and Kenya and Senegal.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 23, 1989; Released: August 30, 1989

By the Chief, International Facilities Division:

1. The above-captioned application filed by MCI Telecommunications Corp. (MCI) on June 29, 1989, requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S. and Kenya and Senegal. The application was placed on public notice on July 5, 1989. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision by MCI of direct service between the U.S. and Kenya and Senegal.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-128 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 15 voice-grade satellite circuits between the Etam, WV earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and Kenya (12 circuits) and Senegal (3 circuits), furnished by MCI's correspondents;

b. lease from AT&T and operate 15 voice-grade circuits in the Etam, WV earth station;

c. lease and operate 15 voice-grade circuits between the Etam, WV earth station and MCI's West Orange, NJ operating center;

d. use said facilities in subparagraphs a, b and c above to provide MCI's regularly authorized services between the U.S., and Kenya (12 voice-grade circuits) and Senegal (three voice-grade circuits), and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MCI and its correspondents in Kenya and Senegal, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. This authorization shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1988).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CICI, INC.	File No. I-T-C-89-103
FTC COMMUNICATIONS, INC.	File No. I-T-C-89-104
OVERSEAS TELECOMMUNICATIONS, INC.	File No. I-T-C-89-110
MCI INTERNATIONAL, INC.	File No. I-T-C-89-121
WORLD COMMUNICATIONS, INC.	File No. I-T-C-89-134
FEDEX INTERNATIONAL TRANSMISSION CORPORATION	File No. I-T-C-89-135

Applications for Authority to Operate Facilities in the Private Transatlantic Telecommunications Cable System for the Provision of Authorized Common Carrier Services to the United Kingdom, the Republic of Ireland and Bermuda and Points Beyond.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: August 22, 1989; Released: August 30, 1989

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications requesting authority under Section 214 of the Communications Act, as amended, and Section 63.01 of the Commission's Rules, to acquire and operate capacity in the Private Transatlantic Cable System (PTAT cable system)[1] for the provision of authorized common carrier services between the United States and the United Kingdom, the Republic of Ireland, Bermuda, and points beyond and to acquire and operate facilties as may be necessary to extend capacity in the PTAT cable system. File Nos. I-T-C-89-103 and I-T-C-89-104 were placed on public notice on May 10, 1989; File No. I-T-C-89-110 was placed on public notice on May 24, 1989; File No. I-T-C-89-121 was placed on public notice on June 28, 1989; and File Nos. I-T-C-89-134 and I-T-C-89-135 were placed on public notice on July 12, 1989. No comments were filed in response to these applications.

I. THE APPLICATIONS

2. CICI, Inc. (CICI) is a corporation organized and existing under the laws of the state of Delaware, doing business as Contel ASC International Division. CICI is engaged in the business of furnishing international telecommuncations services and is a non-dominant international common carrier. Pursuant to an agreement between CICI and Mercury Communications Ltd. (Mercury), to jointly hold up to 120 Minimum Assignable Units of Ownership (MAUOs)[2] in PTAT-1 for the joint provision of authorized services between the United States and the United Kingdom, CICI herein requests authority to acquire (by lease or an Indefeasible Right of Use (IRU) basis) and operate such capacity, and the appropriate connecting facilities, for the provision of its authorized common carrier services. CICI maintains that the proposed acquisition will not result in any significant economic harm to carriers owning and using existing common carrier transmission facilities nor will it impair services to the public. It states that the facilities covered by this application will be used to supplement its existing facilities.

3. FTC Communications, Inc. (FTCC) is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in New York, New York. FTCC is a non-dominant international common carrier in its provision of all international services to all points, except that it remains dominant in its provision of all common carrier services with France. It presently provides authorized services to the points reached via the PTAT cable system. FTCC's application requests authority to: acquire by IRU and operate a one-half interest in two DS-2 circuits [6 megabits per second (Mb/s) circuits][3] in PTAT-1 for its provision of authorized common carrier services. Mercury has agreed to provide the matching portion of the facilities between the United States and the United Kingdom. FTCC will pay PSI the sum of not more than $2,150,000.00 per one-half interest in one DS-2 circuit, plus annual upkeep, and will pay the tariffed rate of a domestic carrier for the domestic facilities.[4] It maintains that the operation of the facilities requested is not expected to require any additional operating, technical or maintenance personnel. It states that because capacity in other common carrier systems is limited, both cable and satellite, PTAT-1 is the best available source for FTCC's current transatlantic fiber-optic capacity requirements.

4. Overseas Telecommunications, Inc. (OTI) is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in Alexandria, Virginia. OTI is a non-dominant international common carrier currently providing authorized common carrier services to the points reached via the PTAT cable system. OTI requests authorization to acquire initially a one-half interest one DS-3 circuit [45 Mb/s circuit][5] in PTAT-1 for the provision of its authorized common carrier services. Specifically, it plans to utilize two T1 circuits [1.544 Mb/s circuits] of the capacity for the provision of service to the Republic of Ireland, one T1 for the provision of service to Bermuda, and the balance of the capacity for services to the United Kingdom. The pur-

chase price for the capacity had not yet been established at the time of OTI's application. OTI states that the capacity it seeks herein will be used to supplement its existing facilities. It further states that the aquisition of a one-half interest in one DS-3 facility will have an insignificant impact on existing and planned North Atlantic facility operators.

5. MCI International, Inc. (MCII) is a corporation organized and existing under the laws of the state of Delaware. MCII is a non-dominant international common carrier currently providing authorized common carrier services to the points reached via the PTAT cable system. MCII requests authority to acquire on an IRU and/or lease basis, as appropriate, a one-half interest in one E-1 circuit [2.048 Mb/s circuit][6] in PTAT-1 to supplement its existing facilities for the provision of services that MCII is now or may hereafter be authorized to provide to the points reached via the PTAT cable system. Mercury will provide the matching portion of the facilities between the United States and the United Kingdom.

6. World Communications, Inc. (Worldcom) is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in New York, New York. Worldcom is a dominant international common carrier and currently provides authorized common carrier services to the points reached via the PTAT cable system. Worldcom seeks authority to: acquire by IRU and operate a one-half interest in two DS-2 circuits in PTAT-1 between the United States and the United Kingdom; acquire by IRU and operate a one-half interest in one E-1 circuit in PTAT-1 between the United States and Ireland; and acquire by IRU and operate a one-half interest in one E-1 circuit in PTAT-1 between the United States and Bermuda. Worldcom will utilize such facilities for its provision of authorized common carrier services. Mercury has agreed to provide the matching PTAT-1 capacity between the United States and the United Kingdom. Cable & Wireless (C&W), Bermuda, and Telecom Eireann, Worldcom's correspondent in Bermuda and Ireland, respectively, have agreed to provide matching PTAT-1 capacity and appropriate connecting facilities, within Bermuda and Ireland, respectively. Worldcom will pay PSI the sums of not more than $2,150,000.00 per one-half interest in one DS-2 circuit to the United Kingdom, $720,000.00 for a one-half interest in one E-1 circuit to Ireland, and $350,000.00 for a one-half interest in one E-1 circuit to Bermuda, plus annual maintenance, and will pay the tariff or contract rate of a domestic supplier for the domestic facilities.[7]

7. Fedex International Transmission Corporation (Fedex) is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business located in Memphis, Tennessee. Fedex is a non-dominant international common carrier currently providing authorized services to the points reached via the PTAT cable system. Fedex requests authority to acquire by IRU and operate a one-half interest in two DS-1 circuits in PTAT-1 between the United States and the United Kingdom.

II. DISCUSSION

8. In 1985, the Commission adopted its private submarine cable policy to promote competition in the provision of international facilities.[8] It determined that an increase in competition in the provision of facilities would stimulate technology and service development to the benefit of international telecommunications users. The Commission granted PSI, formerly Tel-Optik Ltd., a cable landing license to land and operate the PTAT cable system between the United States and the United Kingdom and to sell or lease capacity in the PTAT cable system on a non-common carrier basis.[9] The Commission did not preclude the possibility that common carriers would be permitted to acquire capacity in the PTAT cable system for the provision of their services. It stated that it would require carriers interested in acquiring capacity in PTAT to seek authority under Section 214 of the Communications Act.[10] However, the Commission emphasized that private cable systems shall succeed or fail on their own merits and not through Commission action that would guarantee common carrier use of any system.

9. As a general matter, we find that the grant of the applications herein will promote the policy aims of the Commission's *Private Submarine Cable Decision* and, therefore, will be in the public interest. In a recent grant of US Sprint's application to provide common carrier services over PTAT-1, the Common Carrier Bureau found that the use of a portion of the PTAT-1 cable system for the provision of common carrier services will enhance the viability and credibility of PTAT-1 as an alternative to common carrier facilities.[11] Such use will facilitate the introduction of competition in the provision of international transmission facilities. Indeed, the Commission has made it clear that the introduction of facilities-based competition into a market is a significant and positive step that is beneficial to the public.[12] Such competition will give service providers greater choice in selecting facilities and thus enable them to maintain, or improve and enhance, the economical and efficient provision of their services to the public. The opportunity to choose between facilities will further enable service providers to be more responsive to customer needs in terms of price, service quality, and service availability. The proposals contained in the applications before us, to convert a portion of PTAT-1 capacity to common carriage, will result in these types of public benefits.

10. In reaching this determination, we find that the applicants have provided the information necessary for us to grant their applications.[13] In addition, we find that the circumstances surrounding the applications here do not raise an economic impact issue.[14] Indeed, CICI, OTI, and MCII explicitly state that the private cable capacity that they seek to convert for common carriage will be used to supplement, not divert, their existing traffic. All of the carriers will continue to use their current cable and satellite facilities for the provision of common carrier traffic. Moreover, no party has filed comments arguing that an adverse economic impact would result from their use of PTAT-1 capacity for common carriage. Therefore, we find that when the applications are viewed individually, or even when they are viewed jointly, the factors presented in this case do not warrant consideration of an economic impact issue.

11. Upon consideration of the applications before us, we find that the authorization of the facilities requested would serve the public interest.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, that the applications of CICI (File No. I-T-C-89-103), FTCC (File No. I-T-C-89-104), OTI (File No. I-T-C-89-110), MCII (File No. I-T-C-89-121), Worldcom (File No. I-T-C-89-134), and Fedex (File No. I-T-C-89-135), ARE GRANTED, subject to the following terms, conditions and limitations.

13. CICI is authorized to:

(a) acquire on an IRU and/or lease basis, as appropriate, and operate a one-half interest in up to 120 MAUOs in PTAT-1 for its provision of authorized common carrier services between the United States and the United Kingdom, the Republic of Ireland, Bermuda, and points beyond; and

(b) extend these facilities as may be necessary through appropriate domestic connecting facilities.

14. FTCC is authorized to:

(a) acquire by IRU and operate a one-half interest in two DS-2 circuits in the PTAT cable system for its provision of authorized common carrier services between the United States and the United Kingdom, the Republic of Ireland, Bermuda, and points beyond; and

(b) extend these facilities as may be necessary through appropriate domestic connecting facilities.

15. OTI is authorized to:

(a) acquire on an IRU and/or lease basis, as appropriate, and operate a one-half interest in one DS-3 circuit in PTAT-1 for its provision of authorized common carrier services between the United States and the United Kingdom, the Republic of Ireland, Bermuda, and points beyond; and

(b) extend these facilities as may be necessary through appropriate domestic connecting facilities.

16. MCII is authorized to:

(a) acquire on an IRU and/or lease basis, as appropriate, a one-half interest in one E-1 circuit in PTAT-1 for its provision of authorized common carrier services between the United States and the United Kingdom, the Republic of Ireland, Bermuda, and points beyond; and

(b) extend these facilities as may be necessary through appropriate domestic connecting facilities.

17. Worldcom is authorized to:

(a) acquire by IRU and operate a one-half interest in two DS-2 circuits in PTAT-1 for its provision of authorized common carrier services between the United States and the United Kingdom;

(b) acquire by IRU and operate a one-half interest in one E-1 circuit in PTAT-1 for its provision of authorized common carrier services between the United States and the Republic of Ireland;

(c) acquire by IRU and operate a one-half interest in one E-1 circuit in PTAT-1 for its provision of authorized common carrier services between the United States and Bermuda; and

(d) extend these facilities as may be necessary through appropriate domestic connecting facilities.

18. Fedex is authorized to:

(a) acquire by IRU and operate a one-half interest in two DS-1 circuits in PTAT-1 for its provision of authorized common carrier services between the United States and the United Kingdom, the Republic of Ireland, Bermuda, and points beyond; and

(b) extend these facilities as may be necessary through appropriate domestic connecting facilities.

19. IT IS FURTHER ORDERED that the authorization issued to FTCC herein is subject to the terms and conditions set forth in *FTC Communications, Inc.*, File No. I-S-P-89-003, DA 89-813 (released July 13, 1989).

20. IT IS FURTHER ORDERED that these authorizations are issued subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§ 34-39).

21. This order is issued under section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division

FOOTNOTES

[1] The PTAT cable system consists of two transatlantic fiber optic submarine cables and dedicated fiber optic terrestrial facilities operating between the United States and the United Kingdom. The first cable, PTAT-1, is scheduled to become operational in mid-1989. The PTAT-1 cable also consists of spurs to Bermuda and the Republic of Ireland. *See* Cable Landing License, File Nos. I-S-C-L-84-002 and I-S-C-L-84-003, Mimeo No. 4618 (released May 17, 1985); In the Matter of Tel-Optik, Limited, 100 FCC 2d 1033 (1985)(hereinafter *Private Submarine Cable Decision*).

On March 9, 1989, United Telecommunications, Inc. (UTI), Private Transatlantic Telecommunications Systems, Inc. (PSI) and the Trustees of PSI entered into a Stock Purchase Agreement under which UTI would purchase the stock of PSI in its entirety. UTI, which holds an 80.1 percent interest in US Sprint has assigned its rights and obligations under the Stock Purchase

Agreement to US Sprint. Under the terms of the transfer of control PSI continues to be the licensee and owner of the cable. Therefore, aquisitions of PTAT capacity are being made from PSI. *See Private Transatlantic Telecommunications System, Inc.*, 4 FCC Rcd 5077 (Com. Car. Bur. 1989)(hereinafter *Transfer of Control Decision)*. The applications discussed herein request authority for common carrier use of capacity in PTAT-1.

[2] A MAUO is the unit of ownership designated as the minimum, practical unit of ownership, consisting of 73,684.656 bits per second. A MAUO consists of 64,000 usable bits per second, with the additional 9,684.656 bits per second required for multiplexing purposes. A MAUO is also designated as a DS-0 circuit [64 Kilobits per second (Kb/s) circuit].

[3] This capacity is equivilant to 180 DS-0 circuits [64 Kb/s circuits], or about 1.1 percent of the total PTAT-1 capacity.

[4] Cost information is a relevant factor in review of Section 214 applications filed by dominant carriers. *Cf.* US Sprint Communications Company Limited Partnership, File No. I-T-C-89-084, DA 89-940 (Com. Car. Bur., released August 14, 1989)(" . . . cost information serves no useful purpose where the applicant is a non-dominant carrier, not rate base regulated, has no market power, and is therefore incapable of burdening customers with the cost of underutilizing facilities.")

[5] This capacity is equivilant to 630 DS-0 circuits [64 Kb/s circuits], or about 3.7 percent of the total PTAT-1 capacity.

[6] One E-1, or DS-1, circuit is equivilant to 30 DS-0 circuits, or about .2 percent of the total PTAT-1 capacity.

[7] *See supra* note 4.

[8] *Private Submarine Cable Decision*, 100 FCC 2d 1033.

[9] Cable Landing License, File Nos. I-S-C-L-84-002 and I-S-C-L-84-003, Mimeo No. 4618 (released May 17, 1985).

[10] This requirement was restated in the *International Competitive Carrier* decision, where the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. International Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985).

[11] In the Matter of US Sprint Communications Company Limited Partnership, Memorandum, Opinion, Order and Authorization, File No. I-T-C-89-084, DA 89-940 (Com. Car. Bur., released August 14, 1989).

[12] *See also* In the Matter of Establishment of Satellite Systems Providing International Communications, Report and Order, CC Docket No. 84-1299, 101 FCC 2d 1046 (1985)(hereinafter *Separate Satellite Systems Decision)*.

[13] The Commission places no special burdens on any carrier making an application for private cable capacity. It requires carriers to provide the information required by the Commission's rules to be contained in a Section 214 application. *See* Pacific Telecom, Inc. Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989)(hereinafter *Clarification Order)*.

[14] The Commission stated that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Clarification Order*, 4 FCC Rcd at 4456.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VALU-LINE OF BRENHAM d/b/a TRANS-NET — File No. I-T-C-89-131

Application for authority to operate as an international resale carrier.

VALU-LINE OF LONGVIEW, INC. — File No. I-T-C-89-132

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 23, 1989; Released: August 30, 1989

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on June 27 and 28, 1989, by Valu-Line of Brenham d/b/a Trans-Net, (Trans-Net), and Valu-Line of Longview, Inc. (Valu-Line), respectively, requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on July 12, 1989. No comments were received.

2. The applicants are non-dominant domestic resale carriers. They now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Trans-Net and Valu-Line.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-89-131 and I-T-C-89-132 ARE GRANTED, and:

a. Trans-Net is authorized to provide international switched voice service by the resale of the international switched voice services set forth in MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs; and

b. Valu-Line is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc. 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL TELEPHONE, INC. — File No. I-T-C-89-125

Application for authority to operate as an international resale carrier.

ONLINE COMMUNICATIONS, INC. — File No. I-T-C-89-127

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 23, 1989; Released: August 30, 1989

By the Chief, International Facilities Division:

1. The above-captioned applications filed on June 19 and 20, 1989 by National Telephone, Inc. (NTI), and OnLine Communications, Inc. (OLC), respectively, request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on June 28 and July 5, 1989, respectively. No comments were received.

2. The applicants are non-dominant domestic resale common carriers. They now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by NTI and OLC.

4. Accordingly, IT IS ORDERED that application File Nos. I-T-C-89-125 and I-T-C-89-127 ARE GRANTED, and:

a. NTI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1 between the United States and the points listed in that tariff; and

b. OLC is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the United States and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1988).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-368

In the Matter of

Amendment of Section 73.202(b), RM-6809
Table of Allotments,
FM Broadcast Stations.
(Greenwood, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 14, 1989; Released: August 31, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Team Broadcasting Co., Inc. (petitioner), requesting the substitution of FM Channel 282C3 for Channel 282A at Greenwood, Mississippi. Petitioner also requests the modification of its construction permit (BPH86120SZ) for Channel 282A, to specify Channel 282C3.

2. In support of its request, petitioner requests the allotment of a Class C3 channel to Greenwood in order to increase its coverage area and provide improved service to the Community.

3. We believe petitioner's proposal warrants consideration. Channel 282C3 can be allotted to Greenwood in compliance with the spacing requirements at petitioner's specified side.[1] We shall also propose to modify the construction permit of Team Broadcasting Co., Inc. to specify operation on Channel 282C3 in accordance with Section 1.420(g) of the Commission's Rules.

4. In order to provide a second wide coverage area station for the Greenwood, Mississippi area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Greenwood, Mississippi	230A, 256C1 282A	230A, 256C1 282C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 23, 1989,** and reply comments on or before **November 11, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lawrence Roberts
Mark N. Lipp
Mullin, Rhyne, Emmons
and Topel, P.C.
1000 Connecticut Avenue
Suite 500
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinate for Channel 282C3 at Greenwood are 33-35-48 and 90-15-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-369

In the Matter of

Amendment of Section 73.202(b), RM-6847
Table of Allotments,
FM Broadcast Stations.
(Twin Lakes, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 14, 1989; Released: August 31, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Twin Lakes Broadcasting, Inc. (petitioner) requesting the substitution of Channel 290C3 for Channel 288A at Twin Lakes, Iowa, and the modification of its license for Station KTLB to specify the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 290C3 can be allotted to Twin Lakes in compliance with the Commission's minimum distance separation requirements and can be used at Station KTLB's present transmitter site.[1] As requested, we will also propose to modify petitioner's license for Station KTLB to specify operation on Channel 290C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Twin Lakes or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 290C3 for Channel 288A at Twin Lakes, Iowa, since it could enable Station KTLB to increase its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Twin Lakes, Iowa	228A	290C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 23, 1989,** and reply comments on or before **November 7, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Francis N. Donnelly, President
Twin Lakes Broadcasting, Inc.
North Twin Lakes, S-18
Rockwell City, Iowa 50579
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 42-32-09 and West Longitude 94-40-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-374

In the Matter of

Amendment of Section 73.202(b), RM-6870
Table of Allotments,
FM Broadcast Stations.
(Leland, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 15, 1989; Released: August 31, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Pyramid Communications, Ltd. (petitioner), requesting the substitution of FM Channel 232C3 for Channel 232A at Leland, Michigan. Petitioner also requests modification of its construction permit (BPH850712XY) for Channel 232A, to specify Channel 232C3.

2. We believe petitioner's proposal warrants consideration. Channel 232C3 can be allotted to Leland, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[1] Since Leland is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government is required for this allotment. We shall also propose to modify the construction permit of Pyramid Communications, Ltd. to specify operation on Channel 232C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for the Leland, Michigan area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Leland, Michigan	232A	232C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 23, 1989,** and reply comments on or before **November 7, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Barbara L. Waite
Venable, Baetjer,
Howard & Civiletti
1301 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20004

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 232C3 are 44-51-40 and 85-55-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-590

In the Matter of

Amendment of Section 73.202(b),	RM-6484
Table of Allotments,	RM-6690
FM Broadcast Stations.	
(Ravenel, Barnwell and Blackville, South Carolina)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 18, 1989; Released: September 1, 1989

By the Chief, Allocations Branch:

1. At the request of Coastal Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 4 FCC Rcd 439 (1989), proposing the substitution of Channel 269C2 for Channel 269A at Ravenel, South Carolina, the modification of its license for Station WMGL(FM) to specify operation on the higher powered channel, the substitution of Channel 256A for Channel 269A at Barnwell, South Carolina, and the modification of Station WBAW(FM)'s license to specify operation on the alternate Class A channel. Petitioner, Radio WBAW, Inc. ("WBAW"), licensee of Station WBAW(FM), Barnwell, South Carolina, and Aiken Broadcast Group ("Aiken") filed comments. Aiken's comments also included a counterproposal requesting the allotment of Channel 256A to Blackville, South Carolina.[2] Petitioner filed reply comments.[3,4]

2. Aiken states that Blackville is an incorporated city in Barnwell County, with a 1980 U.S. Census population of 2,700 persons. It urges the allotment of Channel 256A as the community's first local FM service and states its intention to apply for the channel, if allotted.

3. WBAW objected to the modification of its station's license, stating that the existence of co-channel Station WAYS at Macon, Georgia, would curtail the size of the area which currently receives service from Station WBAW(FM). However, in the Supplement to its opposition, it withdraws the opposition in favor of having its license modified to specify Channel 256C3. *See* fn. 3, *supra*. It does, however, state that petitioner should be required to reimburse WBAW for the costs normally incurrred in a change of Class A frequencies.

4. Petitioner reiterates its intention to apply for Channel 269C2 at Ravenel and its intention to reimburse WBAW for the costs incurred in changing to Channel 256A. In reply to the Aiken counterproposal, it states that no comparison of the two communities need be made since an alternate channel is available for use at Blackville to provide that community with its first local service while also permitting Station WMGL(FM) at Ravenel to upgrade its operation on Channel 269C2.

5. Based on the record before us, we believe that the public interest would be served by alloting a first local FM service to Blackville and upgrading Station WMGL(FM) at Ravenel. In light of WBAW's supplemental pleading, it is deemed to have consented to the change in channel. Petitioner is, of course, required to reimburse WBAW for the reasonable costs associated with its change in channel to 265A. We have confirmed that an alternate channel is available for use at Blackville. Therefore, there is no need to comparatively consider the needs of the Blackville and Ravenel for increased radio service. A staff engineering study has found that Channel 250A can be allotted to Blackville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. Channel 269C2 can be allotted to Ravenel in compliance with the Commission's minimum distance separation requirements with a site restriction of 17.2 kilometers (10.7 miles) southwest to accommodate petitioner's desired transmitter site. Channel 256A can be allotted to Barnwell in compliance with the Commission's minimum distance separation requirements and can be used at Station WBAW(FM)'s present transmitter site.[5]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 16, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Barnwell, South Carolina	256A
Blackville, South Carolina	250A
Ravenel, South Carolina	269C2

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Coastal Broadcasting, Inc. for Station WMGL(FM), Ravenel, South Carolina, IS MODIFIED to specify operation on Channel 269C2 in lieu of Channel 269A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Radio Station WBAW, Inc. for Station WBAW(FM), Barnwell, South Carolina, IS MODIFIED to specify operation on Channel 256A in lieu of Channel 269A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WBAW(FM)'s license, BLH-860310KF, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-860310KF, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

9. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station WBAW-FM, as follows: Radio Station WBAW, Inc., P.O. Box 447, Barnwell, South Carolina 29812.

10. The window period for filing applications for Channel 250A at Blackville, South Carolina, will open on **October 17, 1989,** and close on **November 16, 1989.**

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Blackville, South Carolina, has been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on March 17, 1989, Report No. 1771.

[3] Subsequent to the close of the comment period herein, WBAW filed a Petition for Leave to Supplement Opposition, or Alternatively, Petition for Rule Making and Modification of License. This pleading seeks the substitution of Channel 256C3 instead of Channel 256A for its present Channel 269A at Barnwell and the modification of its license accordingly. This pleading has been considered herein for the sole purpose of permitting WBAW to withdraw its opposition to the *Order to Show Cause*. That portion of the pleading concerning the substitution of Channel 256C3 at Barnwell and the modification of its license to specify the higher powered channel has not been considered in the context of this proceeding since it constitutes an untimely counterproposal. However, in light of our action herein, we have separately accepted the pleading as a new petition for rule making which will be the subject of a separate Notice of Proposed Rule Making.

[4] Ed Winton submitted a timely reply comment, entitled Opposition to Petition for Rule Making and for Modification of Licenses. However, the pleading carried forward the erroneous Docket 88-590 designation which was affixed to the petition for rule making filed by Tele-Dodge Broadcasting Company, Inc. to which it refers. The Tele-Dodge request concerns channel allotments at Milan, Metter and Swainsboro, Georgia, and does not impact on this proceeding. Therefore, the pleading will not be discussed.

[5] The coordinates for Channel 250A at Blackville are North Latitude 33-21-48 and West Longitude 81-16-06. The coordinates for Channel 269C2 at Ravenel are North Latitude 32-40-40 and West Longitude 80-23-40. The coordinates for Channel 256A at Barnwell are North Latitude 33-13-25 and West Longitude 81-21-35.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-379

In the Matter of

Amendment of Section 73.202(b),	RM-6618
Table of Allotments,	RM-6657
FM Broadcast Stations.	RM-6670
(Atlantic, Audubon, Fairfield	RM-6793
and Newton, Iowa)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: August 18, 1989; Released: August 31, 1989

By the Chief, Allocations Branch:

1. The Commission has before it four mutually exclusive or inter-related petitions for rule making to allot FM channels to the above-captioned communities. Our review of the proposals shows that site restrictions can be imposed on the Fairfield and Newton allotments to avoid a conflict with each other and with either the Atlantic or Audubon proposals. However, the Atlantic and Audubon proposals are mutually exclusive. The two communities are located only 28 kilometers apart while the Commission's Rules specify a 224 kilometer separation between co-channel Class C2 and C1 allotments. Each of the proposals is described below.

2. Wireless Communications Corp. ("Wireless") requests the allotment of Channel 243C2 to Atlantic, Iowa, as the community's second local FM service (RM-6618). It states that Atlantic is an incorporated town with a 1980 U.S. Census population of 7,789 persons. Wireless indicates that it will apply for the channel, if allotted.

3. Christian Family Radio ("Christian Family") seeks the allotment of Channel 243C1 to Audubon, Iowa, as its first local FM service (RM-6657). Christian Family states that Audubon, the seat of Audubon County, is removed from any population centers and that the county is without any local radio service. Audubon has a 1980 U.S. Census population of 2,841 persons. It states that it will apply for the channel, if allotted.

4. KCOB/KLVN ("KCOB") requests the substitution of Channel 241C2 for Channel 240A at Newton, Iowa, and the modification of its license for Station KLVN-FM to specify operation on the higher powered channel (RM-6670).

5. Galesburg Broadcasting Company ("Galesburg") seeks the substitution of Channel 240C2 for Channel 240A at Fairfield, Iowa, the modification of its license for Station KCMD accordingly, the substitution of Channel 241A for Channel 240A at Newton, Iowa, and the modification of KLVN-FM's license to specify the alternate Class A channel. Alternatively, Galesburg proposes that the coordinates specified by KCOB for Channel 241C2 at Newton be revised to specify a 13.3 kilometer west site restriction instead of the 12.8 kilometer west site restriction specified by KCOB to avoid the short-spacing to Channel 240C2 at Fairfield (RM-6793). Galesburg states that Fairfield, in Jefferson County, has a 1980 U.S. Census population of 9,428 persons. Jefferson County, according to Galesburg, receives local service only from its co-owned AM and FM stations. It states that it will apply for Channel 240C2, if allotted to Fairfield.

6. We believe the public interest would be served by soliciting comments on the above proposals, thus providing each of the parties with an opportunity to demonstrate in comments why its community should be preferred. Parties should be guided by the allotment priorities set forth in *FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). It should be noted that our preliminary approach in this proceeding would be to favor a first local service at Audubon over a second such service at Atlantic. We are also proposing to modify the licenses of Station KMCD at Fairfield, Iowa, to specify operation on Channel 240C2, and KLVN-FM at Newton to specify operation on Channel 241C2 or 241A, if it objects to the imposition of the additional site restriction. We note, however, that Channel 241C2 cannot be used at Station KLVN-FM's present site, even if the Fairfield proposal were not before us. In compliance with Section 1.420 of the Commission's Rules, these licenses may be modified in rule making without accepting competing expressions of interest in use of these channels at Fairfield or Newton and without requiring either KCOB or Galesburg to demonstrate the availability an additional equivalent class channel for use by such interested parties. Galesburg failed to state that it would reimburse KCOB for the reasonable cost associated with the change in its channel of operation to Channel 241A. Therefore, it is requested to do so in comments herein. Should KCOB agree, instead, to upgrade on Channel 241C2 at the coordinates specified in footnote 1, *infra*, no reimbursement costs would be assessed against Galesburg.

7. Channel 243C2 can be allotted to Atlantic in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. Channel 243C1 can be allotted to Audubon with a site restriction of 30.4 kilometers southeast. Channel 240C2 can be allotted to Fairfield with a site restriction of 16.2 kilometers southwest. Channel 241C2 can be allotted to Newton with a site restriction of 13.3 kilometers west and Channel 241A can be allotted to Newton for use at Station KLVN-FM's present transmitter site.[1]

8. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
	Option I	
Atlantic, Iowa	279C	243C2, 279C
Fairfield, Iowa	240A	240C2
Newton, Iowa	240A	241C2 or 241A
	Option II	
Audubon, Iowa	--	243C1
Fairfield, Iowa	240A	240C2
Newton, Iowa	240A	241C2 or 241A

9. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, KCOB/KLVN, Inc., licensee of Station KLVN-FM, Newton, Iowa, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 241A as proposed herein instead of the present Channel 240A.

10. Pursuant to Section 1.87 of the Commission's Rules, KCOB/KLVN may, not later than **October 23, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on KCOB/KLVN to furnish additional information. If KCOB/KLVN raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date refered to above, KCOB/KLVN will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

11. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station KLVN-FM as follows: John E. Carl, President, KCOB/KLVN, Inc., 6111 First Avenue East, Newton, Iowa 50208.

12. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

13. Interested parties may file comments on or before **October 23, 1989,** and reply comments on or before **November 7, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John E. Carl
President,
KCOB/KLVN, Inc.
611 First Avenue
East
Newton, Iowa 50208
(Petitioner for Newton)

John T. Pritchard
Galesburg Broadcasting
Company
57 1/2 S. Court Street
Fairfield, Iowa 52556
(Petitioner for
Fairfield)

James M. Weitzman,
Esq.
Kaye, Scholer,
Fierman, Hayes and
Handler
901 - 15th Street,
N.W.
Washington, D.C. 20005
(Counsel to Christian
Family)

Barry A. Friedman,
Esq.
Wilner & Scheiner
1200 New Hampshire Avenue,
N.W. Suite 300
Washington, D.C. 20036
(Counsel to Wireless)

14. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

15. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 243C2 at Atlantic are North Latitude 41-24-00 and West Longitude 95-00-54. The coordinates for Channel 243C1 at Audubon are 41-30-04 and 94-42-09. The coordinates for Channel 240C2 at Fairfield are 40-54-33 and 92-05-45. The coordinates for Channel 241C2 at Newton are 41-43-16 and 93-12-22. The coordinates for Channel 241A at Newton are 41-41-42 and 93-00-49.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-370

In the Matter of

Amendment of Section 73.202(b), RM-6842
Table of Allotments,
FM Broadcast Stations.
(Wadesboro, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 14, 1989; Released: August 31, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Red Penny Broadcasting (petitioner), requesting the substitution of Channel 228C3 for Channel 228A at Wadesboro, North Carolina, and the modification of its construction permit for a new Class A station there to specify the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 228C3 can be allotted to Wadesboro in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.9 kilometers (3.1 miles) northeast to avoid a short-spacing to Station WZNS, Channel 225C, Dillon, South Carolina, Station WCEZ, Channel 228A, Columbia, South Carolina, and to an application for Channel 229A at Bishopville, South Carolina (BPH-880519ND).[1] As requested, we also propose to modify petitioner's construction permit to specify Channel 228C3. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 228C3 at Wadesboro or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 228C3 for Channel 228A at Wadesboro, North Carolina, since it could provide the community and its environs with expanded radio service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Wadesboro, North Carolina	228A	228C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 23, 1989,** and reply comments on or before **November 7, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Justine Hope Lambert
General Partner, Red Penny Broadcasting
208 S. Rutherford Street
Wadesboro, North Carolina 28170
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-59-57 and West Longitude 80-02-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-89-051

For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Convey a Whole Interest in 12 Minimum Assignable Units of Ownership in Segment F of the Transcaribbean Cable System to Microtel, Inc. on an Indefeasible Right of User Basis

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: August 24, 1989; Released: August 31, 1989

By the Chief, International Facilities Division:

1. On January 31, 1989, American Telephone and Telegraph Company (AT&T) filed the above-captioned application requesting authority, as may be necessary, under Section 214 of the Communications Act of 1934, as amended, to convey a whole interest in 12 minimum assignable units of ownership (MAUOs) in Segment F of the Transcaribbean Cable System (TCS-1) to Microtel, Inc. (Microtel) on an indefeasible right of user (IRU) basis.[1] The application was placed on public notice on February 8, 1989. No comments were received. We grant the application for the reasons set forth below.

2. AT&T states that Microtel has recently contacted it concerning the acquisition of, on an IRU basis, 12 whole MAUO's in Segment F of TCS-1. AT&T describes Microtel as a facility-based, non-dominant, certificated carrier that proposes to use the capacity in TCS-1 for services to be provided from points in or reached via Florida to Puerto Rico. AT&T states that it has entered into a Memorandum of Understanding (MOU) with Microtel providing for AT&T's grant of IRU by mutually acceptable agreement for an estimated consideration of $11,000 per whole MAUO, payable in installments as TCS-1 is being constructed and equal to the estimated capital cost of TCS-1 allocable to the capacity granted. AT&T also states that Microtel will be required to pay for on-going operations and maintenance costs allocable to its capacity once TCS-1 is operational.

3. In its *TCS - 1 Order*, the Commission required the applicants to make available interests in TCS-1 capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity. The conveyance of the proposed IRU interests is therefore consistent with the Commission's concern that capacity in the TCS-1 cable be made available to U.S. carriers who did not participate on an original ownership basis. Although the *TCS-1 Order* contemplated that the carrier acquiring TCS-1 capacity would be authorized, we note that Microtel proposes to use the TCS-1 capacity to provide domestic service between the U.S. and Puerto Rico. Under the Commission's *Domestic Competitive Carrier* decision,[2] Microtel is not required to file an application to acquire the TCS-1 capacity at issue here. In light of these circumstances, we find that the application is consistent with the Commission's *TCS-1 Order*, and a grant of the requested conveyance of IRU interests from AT&T to Microtel will serve the public interest.

4. Accordingly, IT IS ORDERED that the application of American Telephone and Telegraph Company, File No. I-T-C-89-051, IS GRANTED and AT&T is authorized to convey to Microtel, Inc. an IRU interest in 12 whole minimum assignable units of ownership in Segment F of the TCS-1.

5. The Commission retains jurisdiction over this matter to reallocate circuits in the Transcaribbean Cable System among the various international common carriers and other authorized users.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] AT&T states that the instant application was filed without prejudice to its position that Section 214 of the Communications Act of 1934, as amended, and the Commission's *TCS-1 Order*, 3 FCC Rcd 6073 (1988), do not require the filing of an application by a carrier proposing to grant an IRU. We need not address the merits of AT&T's position in the context of this application where the *TCS-1 Order* specifically requires the conveying carrier to file an application and the acquiring carrier, as a non-dominant carrier, is not required to file an application under Section 214 of the Communications act of 1934, as amended.

[2] Policy and Rules Concerning rates and Facilities Authorizations for Competitive Carrier Services (CC Docket No. 79-252), Notice of Inquiry and Proposed Rule Making, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rule Making, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982); *recon.* FCC 83-69, released March 21, 1983; Second Further Notice of Proposed Rule Making, FCC 82-187, released April 21, 1982; Third Further Notice of Proposed Rule Making, Mimeo No. 33457, released June 14, 1983, 48 Fed. Reg. 28,292 (June 21, 1983); Third Report and Order, Mimeo No. 012, released October 6, 1983. 48 Fed. Reg. 46,791, (October 15, 1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rule Making, FCC 84-82, released March 22, 1984, 49 Fed. Reg. 11,856 (March 28, 1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985); *rev'd* MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION CORPORATION — File No. I-T-C-88-198

For authority to provide transborder satellite video service via Westar V from Aruba, Netherlands Antilles to the U.S. Virgin Islands and other locations

BENEDEK BROADCASTING OF THE VIRGIN ISLANDS, INC. — File No. CSG-88-087-P/L

For authority to establish a receive-only earth station for reception of transborder satellite video service on St. Thomas, U.S. Virgin Islands

ORDER AND AUTHORIZATION

Adopted: August 23, 1989; Released: August 31, 1989

By the Chief, International Facilities Division:

1. In an order released December 5, 1988,[1] the Commission conditionally authorized the applications of Western Union Corporation (Western Union) and Benedek Broadcasting of the Virgin Islands, Inc. (Benedek) which requested authority pursuant to Section 214 and Title III of the Communications Act of 1934, as amended, to permit video programming originating in Aruba, Netherlands Antilles and distributed throughout the Netherlands Antilles via the Westar V satellite to be received by Benedek in the U.S. Virgin Islands. The conditional authorization stated that service could not be implemented until: (1) the Department of State informs the Commission that the United States has satisfied its obligations under Article XIV(d) of the INTELSAT Agreement; and (2) a final order is issued by the Common Carrier Bureau authorizing the final implementation of service.

2. The prerequisites for final implementation of service have now been satisfied. At its meeting held July 11-13, 1989, the INTELSAT Assembly of Parties approved for reception in the United States television programming which originated in Aruba via the Westar V satellite. By letter dated August 17, 1989, the Department of State informed the Commission that the United States has fulfilled its obligations to consult with INTELSAT under the INTELSAT Agreement regarding the subject service. In light of these circumstances, we find that a grant of final authorization is consistent with the Commission's Transborder policy and will in the public interest.

3. Accordingly, IT IS ORDERED that the applications of Western Union Corporation, File No. I-T-C-88-198, and Benedek Broadcasting of the Virgin Islands, Inc., File No. CSG-88-087-P/L, ARE GRANTED on a final basis and service may be implemented without any further action by this Commission.

4. This authorization constitutes the final step for the provision of transborder services through domestic satellites only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by the other country involved.

5. This order shall not be construed as authorizing the reception of programming where the appropriate copyright clearances have not been obtained.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] Western Union Corporation, 3 FCC Rcd 7228 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company Tariff F.C.C. No. 1 — Transmittal No. 166

ORDER

Adopted: September 15, 1988;Released: September 16, 1988

By the Chief, Common Carrier Bureau:

1. On June 3, 1988, the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, operating jointly as US West Communications (US West), filed the above-referenced transmittal in order to propose the bifurcation of their Local Transport rate element. Under the proposed transmittal, this element would be divided into two separate elements -- Local Transport Facility (LTF), which according to US West would be mileage sensitive, and Local Transport Termination (LTT), which would be non-mileage sensitive.

2. Teleconnect Long Distance Service and Systems Company (Teleconnect) and Enhanced Telemanagement, Inc. (ETI) filed petitions on June 28, 1988, to reject, or in the alternative, to suspend and investigate Transmittal 166. US West filed a reply to the Teleconnect and ETI petitions on July 14, 1988. Transmittal 166 is scheduled to become effective on September 17, 1988.

3. Teleconnect maintains that US West has failed to provide the information necessary to support its transmittal under Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. Furthermore, Teleconnect criticizes US West's use of Local Transport revenue requirement allocators to establish interrelationships among the mileage bands. Teleconnect Petition at 4. Teleconnect also contends that it built its network in reliance on the current Local Transport rate structure and alleges that rates will increase vastly as a result of US West's proposal. *Id.* at 9.

4. ETI's primary concern is that US West intends to use the tariff revisions to charge ETI, for the first time, interstate access charges. ETI states that as a central office reseller it has never been required to pay such charges. ETI Petition at 1. ETI alleges that US West, based on its interpretation of the Commission's decision in the CC Docket No. 86-1 proceedings,[1] has been contemplating applying interstate access charges to central office resellers. ETI believes that Transmittal 166 is the first step by US West toward levying such charges against ETI. *Id.* at 3.

5. In response to the petitions, US West argues that by bifurcating the Local Transport element, the pricing structure for Local Transport services will more closely be aligned with costs. US West Reply at 2. Furthermore, US West maintains that because it realizes the impact the proposed transmittal will have on customers' current network configurations, it has adopted a five-step phase-in plan, to soften the impact of the proposed rates. *Id.* at 13. US West subsequently sent a letter to ETI stating that it is deferring its plans to apply interstate access charges to central office resellers until the Commission issues a clarification on the appropriateness of such charges.[2]

6. The Common Carrier Bureau has reviewed the tariff transmittal, the description and justification supporting it, and the pleadings. We find that no compelling argument has been presented that the tariff revisions filed by US West are patently unlawful so as to require rejection. Nor do the revisions warrant investigation at this time.

7. IT IS THEREFORE ORDERED that the petitions to reject or suspend and investigate filed by Teleconnect Long Distance Service and Systems Company and Enhanced Telemanagement, Inc., in response to the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 424, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* WATS-Related and Other Amendments of Part 69 of the Commission's Rules, 59 R.R.2d 1418 (1986).

[2] *See* Letter of Aug. 19, 1988, from Lawrence E. Sarjeant, US West, to Dennis DeSender, President, ETI.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-43

In the Matter of

NEW JERSEY BELL TELEPHONE COMPANY
Tariff F.C.C. No. 38 — Transmittal No. 474

BELL ATLANTIC TELEPHONE COMPANIES
Tariff F.C.C. No. 1 — Transmittal No. 52

Proposed Revisions To Establish Rates and Regulations for Local Packet Switching Service

Motion for Extension of Time

ORDER

Adopted: August 18, 1989; Released: August 21, 1989

By the Chief, Common Carrier Bureau:

1. On August 15, 1989, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a motion[1] for extension of time until September 5, 1989, in which to file their opposition to the petition for reconsideration filed by Telenet Communications Corporation (Telenet) and Tymnet-McDonnell Douglas Network Systems Company (Tymnet) in the above-captioned proceeding.[2] Bell Atlantic states that the resources needed to respond to the petition have been severely strained due to prior commitments and unanticipated demands occasioned by the current work stoppage. Bell Atlantic Motion at 2. Bell Atlantic also indicates that Telenet and Tymnet are not opposed to its request. *Id.* at 2.

2. The Common Carrier Bureau has reviewed Bell Atlantic's motion. We find that Bell Atlantic has stated a reasonable basis for the brief extension requested, and that the requested extension does not appear to prejudice any interested party. We therefore conclude that good cause has been shown for grant of Bell Atlantic's motion.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the motion for extension of time filed by the Bell Atlantic Telephone Companies IS GRANTED. All parties wishing to file oppositions to the petition for reconsideration filed by Telenet and Tymnet may do so no later than **September 5, 1989.** Replies are due no later than **September 12, 1989.**

FEDERAL COMMUNICATIONS COMMISION

Gerald Brock
Chief, Common Bureau

FOOTNOTES

[1] Bell Atlantic Telephone Companies, Motion for Extension of Time, filed Aug. 15, 1989 (Bell Atlantic Motion).

[2] Telenet Communications Corporation and Tymnet-McDonnell Douglas Network Systems Company, Petition for Reconsideration, filed Aug. 7, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS — Transmittal No. 1731

Revisions to Tariff F.C.C. Nos. 1, 2, and 14

ORDER

Adopted: August 21, 1989; Released: August 22, 1989

By the Chief, Common Carrier Bureau:

1. On August 9, 1989, AT&T filed the above-captioned tariff transmittal proposing to reduce to zero certain non-recurring service ordering charges for several existing AT&T offerings. These charges are currently assessed for receiving, recording, and processing customer information relating to an order placed in connection with, or after, the establishment of service. On August 16, 1989, US Sprint Communications Company Limited Partnership (Sprint) and MCI Telecommunications Corporation (MCI) filed petitions to reject, or alternatively to suspend and investigate the proposed tariff revisions.[1] AT&T filed a reply on August 21, 1989. Transmittal No. 1731 is currently scheduled to become effective on August 23, 1989, on 14 days' notice.

2. Both Sprint and MCI observe that this tariff revision was originally proposed by AT&T on July 26, 1989, under Transmittal No. 1704, to become effective on 14 days' notice. Sprint Petition at 1. *See also* MCI Petition at 2. MCI and Sprint state that on August 8, 1989, the Chief of the Tariff Division notified AT&T that the proposed elimination of the service ordering non-recurring charge (NRC) constituted a rate restructure, and that such rate structure changes must be filed on 45 days' notice pursuant to the Commission's Rules.[2] They note that AT&T was given the option of deferring the effective date of Transmittal No. 1704 to September 4, 1989, or withdrawing it completely and refiling the proposed changes under a new transmittal. The petitioners state that AT&T withdrew Transmittal No. 1704 and reinstated under Transmittal No. 1726 all of the NRCs which it had proposed to eliminate. Sprint and MCI assert that AT&T then submitted Transmittal No. 1731, in which, as an alternative to eliminating the service ordering NRCs, AT&T now proposes to set these charges equal to zero.

3. Sprint argues that the proposed reduction of the service ordering NRC to zero is an attempt by AT&T to circumvent the rules applicable to rate restructures. Sprint Petition at 2. Sprint contends that by AT&T's own admission, the instant filing is merely a reformatted and refiled version of Transmittal No. 1704. *Id.* at 3. Sprint maintains that Transmittal No. 1731 does not change the underlying nature or intent of the original tariff revisions and that AT&T's protestations that such revisions do not involve rate restructuring must be considered incorrect. *Id.* Sprint asserts that allowing AT&T to set tariffed rate elements equal to zero effectively eviscerates the system of price cap regulation. *Id.* at 3-4.

4. MCI states that the Commission found in the AT&T price cap proceeding that a service may be restructured by changing an existing method of charging or provisioning, by changing a term or condition, by adding language, or by consolidating or eliminating rate elements. MCI Petition at 2-3. In Transmittal 1704, MCI continues, AT&T proposed to remove rate elements from its tariff. According to MCI, in the instant transmittal AT&T is proposing to charge a price of zero for those same rate elements, which would be retained in the tariff. *Id.* at 3. MCI contends that providing a feature that formerly carried a charge at no charge is clearly changing an existing method of charging. MCI also asserts that, at a zero price, rate elements effectively have been eliminated. *Id.* at 3.

5. AT&T disputes petitioners' claims that Transmittal No. 1731 constitutes a rate restructuring, arguing instead that its proposal to reduce NRC rates to zero is a rate level change as defined in Section 61.3(aa) of the Commission's Rules, 47 C.F.R. § 61.3(aa). AT&T Reply at 3. Moreover, AT&T asserts, according the instant filing steamlined treatment is fully consistent with the objectives of price cap regulation, since the filing does not raise the discrimination concerns which underlie the stricter tariff review procedures prescribed for rate restructurings. *Id.* at 4.

6. The Common Carrier Bureau has reviewed the tariff transmittal and the pleadings. We conclude that no compelling argument has been presented that the proposed tariff is patently unlawful so as to require rejection, and that no question has been presented that warrants suspension or investigation at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject or, alternatively, to suspend and investigate the above-captioned transmittal filed by US Sprint Communications Company Limited Partnership and MCI Telecommunications Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] US Sprint Communications Company Limited Partnership, Petition To Reject or Alternatively Suspend and Investigate, filed Aug. 16, 1989 (Sprint Petition); MCI Telecommunications Corporation, Petition To Reject, filed Aug. 16, 1989 (MCI Petition).

[2] Letter from Chief, Tariff Division, Common Carrier Bureau, to C.E. Link, AT&T Administrator Rates and Tariffs, dated Aug. 8, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Local Exchange Carrier Tariff
Revisions for the Application of
Universal Service Fund and Lifeline
Assistance Program Charges

ORDER

Adopted: July 28, 1989; Released: July 31, 1989

By the Deputy Chief, Common Carrier Bureau:

1. On July 21 and July 25, 1989, respectively, MCI Communications Corporation (MCI) and Allnet Communications Services, Inc. (Allnet) filed petitions to reject local exchange carrier (LEC) tariff revisions concerning the application of charges for the Universal Service Fund (USF) and Lifeline Assistance Program (Lifeline).[1] The National Exchange Carrier Association, Inc. (NECA) filed a reply on July 27, 1989. These tariff revisions are scheduled to go in effect August 1, 1989. A list of the LECs filing revisions is included in Appendix A.

2. MCI asserts that the inclusion of terms and conditions for the treatment of non-payment of USF and Lifeline charges in the proposed transmittals violates Section 201(b) and 203(a) of the Communications Act of 1934, 47 U.S.C. §§ 201(b), 203(a). Specifically, MCI objects to conditions and terms associated with discontinuance of service, refusal to process service orders, or refusal to take applications for additional service. According to MCI, the Communications Act prohibits the LECs from imposing these tariff terms, since USF and Lifeline are not services which the carriers actually provide. MCI Petition at 2. Furthermore, MCI insists it is discriminatory to require some, but not all, carriers with presubscribed lines to pay USF and Lifeline charges. It accuses the Commission of creating this inequity by failing to take any action regarding the criteria for funding these programs. MCI states that the Commission has been provided with numerous suggestions for improving the funding of the programs. *Id.* at 3-4.

3. Allnet claims that the NECA provisions cross referenced in the various LEC tariffs are inconsistent with Sections 69.116 and 69.117 of the Commission's rules, 47 C.F.R. §§ 69.116, 69.117 and, therefore, are patently unlawful. Allnet Petition at 11-14. Allnet asks that if the Common Carrier Bureau grants waivers to the criteria set forth in the existing rules, it should be even-handed, by eliminating all exemptions from the assessment of these charges, and applying the USF and Lifeline charges to all interexchange services. *Id.* at 14-15. It also argues that the proposed tariff revisions do not provide the same dispute resolution rights currently applied to other switched access service charges. According to Allnet, the basic flaw in the proposed tariff revisions is their failure to provide any clearcut accountabiliy between the entity doing the collection (*i.e.*, NECA) and the entity discontinuing service (*i.e.*, the LECs). *Id.* at 15-16.

4. Allnet believes NECA should utilize the Commission's complaint process to resolve billing disputes, since the method proposed in the revisions is unjust and unreasonably discriminatory in favor of the LECs. *Id.* at 16-18. In the alternative, Allnet suggests the inclusion of certain discontinuance provisions that are comparable to those provided for other access charges. *Id.* at 18-20. In addition, to increase accountability, it believes each LEC should be required to report to each of its access customers the data it has provided to NECA for the assessment of the USF and Lifeline charges. *Id.* at 20.

5. NECA responds that MCI and Allnet have failed to present any reason why the proposed tariff revisions, which were filed at the request of the Chief, Tariff Division,[2] should not become effective on the scheduled date. It terms Allnet's contention that the proposed rates are unlawful irrelevant to the determination whether the criteria are reasonable. NECA Petition at 4. NECA notes that the tariff revisions which apply USF and Lifeline charges have been in effect since December 1988, and that Allnet has had ample opportunity to challenge the rate through the Section 208 complaint process. *Id.* NECA also dismisses Allnet's complaint that the proposed revisions do not provide the same dispute resolution rights that are currently applied to switched access service charges. It believes such procedures are unnecessary since the USF and Lifeline billing process is far less complex than access billing, and because interexchange carriers have extensive opportunities to verify billing calculations in advance. *Id.* at 4-6.

6. NECA finds equally uncompelling MCI's assertion that common carrier tariff provisions cannot be applied to USF and Lifeline charges. It states that this argument was rejected long ago by both the Commission and the D.C. Circuit and that MCI should not be allowed to re-hash the claim in this proceeding. *Id.* at 8-9. Finally, NECA argues that MCI's claim of discrimination against carriers that qualify to pay USF and Lifeline charges has no bearing on the tariff revisions at issue. *Id.* at 9.

7. The Common Carrier Bureau has reviewed the tariff filings and the various pleadings. We conclude that no compelling argument has been presented that the proposed tariff revisions are patently unlawful so as to require rejection, or that the grants of special permission referenced herein require reconsideration. The LEC revisions before us merely implement the requirements the Commission established when the Commission amended the access charge rules to establish separate USF and Lifeline charges.[3] The special permission properly enabled the exchange carriers to correct omissions in their tariffs promptly. If these petitioners believe the Commission erred in adopting the relevant rules, the petitioners should have filed a timely petition for reconsideration.

8. Petitioners objections to the formula for assessing interexchange carriers are also untimely because these tariff filings do not change that formula. We note, however, that the Commission adopted an Order on July 21, 1989, revising the Section 69.116 and 69.117 formula as proposed in the Notice of Proposed Rule Making in CC Docket Nos. 78-72 and 80-286.[4]

9. Accordingly, IT IS ORDERED that the petitions filed by MCI Communications Corporation and Allnet Communications Services, Inc., regarding the local exchange carrier revisions and grants of special permission listed in Appendix A, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

APPENDIX A

LOCAL EXCHANGE CARRIERS FILING TARIFF REVISIONS INVOLVING UNIVERSAL SERVICE FUND AND LIFELINE ASSISTANCE CHARGES[5]

ALLTEL Illinois, Inc.
Ameritech Operating Companies
Bay Springs Telephone Company
Bell Atlantic Telephone Companies
BellSouth Telephone Companies
Canby Telephone Association
Centel Telephone Companies
The Chillicothe Telephone Company
Cincinnati Bell Telephone Company
Citizens Telephone Company of Higginsville, MO
Coastal Utilities, Inc.
Concord Telephone Company
Contel Telephone Companies
Dunkirk and Fredonia Telephone Company
Elkhart Telephone Company
Granite State Telephone, Inc.
GTE Telephone Operating Companies
GVNW, Inc./Management
Great Plains Communications, Inc.
Hargray Telephone Company, Inc.
Illinois Consolidated Telephone Company
LaFourche Telephone Company
Lincoln Telephone & Telegraph Company
Merrimack County Telephone Company
Mt. Horeb Telephone Company
Nevada Bell
New England Telephone and Telegraph Company
Pacific Bell
Pineland Telephone Cooperative
Rochester Telephone Corporation
Ronan Telephone Company
Roseville Telephone Company
Sours River Telephone Mutual Aid Corporation
Southeast Telephone Company of Wisconsin, Inc.
Southern New England Telephone Company
Southwestern Bell Telephone Company
Taconic Telephone Corporation
Union Telephone Company
United Telecommunications, Inc.
Urban Telephone Corporation
US West Telephone Companies
Vista-United Telecommunications
Virgin Islands Telephone Corporation
Walnut Hill Telephone Company
Warwick Valley Telephone Company
Wood County Telephone Company

FOOTNOTES

[1] Allnet also seeks limited reconsideration of the special permissions granted to the filing carriers that allowed the incorporation by reference of certain Natinal Exchange Carrier Association (NECA) tariff revisions relating to USF and Lifeline charges. In addition, Allnet requests that any waiver granted of the Commission's rules involving criteria for application of USF and Lifeline chrges require that such charges be addressed to all interexchange carriers, including those which provide intraLATA-only interexchange services.

[2] *See* Letter to James W. Frame, NECA, From John Cimko, Chief, Tariff Division, Common Carrier Bureau (June 19, 1989).

[3] *See* 47 C.F.R. § 69.4(c).

[4] Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance, *Notice of Proposed Rule Making*, 4 FCC Rcd 2041 (1988); *Memorandum Opinion and Order*, CC Docket Nos. 78-72 and 80-286, adopted July 21, 1989. In the *Memorandum Opinion and Order*, the Commission revised the criteria governing which interexchange carriers would be assessed charges for costs attributable to USF and Lifeline Assistance. Under the new criteria, only interexchange carriers with more than .05 percent of all nationwide presubscribed lines will be required to pay the per-line charge to fund these programs.

[5] All revisions were made under grant of special permission.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 17, 1989

COMMENTS INVITED ON CHICAGO METROPOLITAN AREA REGIONAL PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the Chicago Metropolitan area (Region 54).

In accordance with the Commission's Report and Order in General Docket 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket 87-112, Region 54 consists of the following counties: Winnebago, McHenry, Cook, Kane, Kendall, Grundy, Boone, Lake, Dupage, De Kalb, Will, and Kankakee, Illinois; Kenosha, Milwaukee, Washington, Dodge, Walworth, Jefferson, Racine, Ozaukee, Waukesha, Dane, and Rock, Wisconsin; Lake, La Porte, Jasper, Starke, St. Joseph, Porter, Newton, Pulaski, Marshall, and Elkart, Indiana; and Ottawa, Kent, Van Buren, Kalamazoo, Barry, Muskegon, Allegan, Berrien, Cass, and St. Joseph, Michigan. General Docket 87-112, 3 FCC Rcd 2113 (1988).

Comments should be clearly identified as submissions to **General Docket 89-363, Chicago Metropolitan Area - Region 54,** and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Fred Thomas, Office of Engineering and Technology, (202) 653-8112, or Maureen Cesaitis, Private Radio Bureau, (202) 632-6497.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-372

In the Matter of

Amendment of Section 73.202(b), RM-6907
Table of Allotments,
FM Broadcast Stations.
(Clarksdale, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 15, 1989; Released: September 1, 1989

By the Chief, Allocations Branch:

1. WKDJ Radio (petitioner) has filed a rule making petition requesting the substitution of FM Channel 243C3 for Channel 243A at Clarksdale, Mississippi. Petitioner also requests modification of its construction permit for Channel 243A to specify operation on Channel 243C3.

2. Channel 243C3 can be allotted to Clarksdale, Mississippi, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's site.[1] We shall propose to modify the construction permit for Channel 243A to specify operation on Channel 243C3 in accordance with Section 1.420(g) of the Rules.

3. In order to provide a wide coverage area station for the Clarksdale, Mississippi area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules for the following community:

	Channel No.	
City	Present	Proposed
Clarksdale, Mississippi	243A, 269A, 292A	243C3, 269A, 292A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 23, 1989,** and reply comments on or before **November 7, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

J. Boyd Ingram; General Partner
P.O. Box 73
Batesville, Mississippi 38606

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 243C3 are 34-06-00 and 90-25-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-373

In the Matter of

Amendment of Section 73.202(b), RM-6873
Table of Allotments,
FM Broadcast Stations.
(Lexington, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 7, 1989; Released: September 1, 1989

By the Chief, Allocations Branch:

1. Before the Commission is a petition for rule making filed by J. Scott Communications, Inc. (petitioner), requesting the substitution of FM Channel 290C3 for Channel 292A at Lexington, Mississippi. Petitioner also requests modification of its license for Station WLTD(FM), Channel 292A, to specify Channel 290C3.

2. We believe petitioner's proposal warrants consideration. Channel 290C3 can be allotted to Lexington, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's specified site.[1] We shall also propose to modify the license of Station WLTD(FM), Channel 292A, to specify operation on Channel 290C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for the Lexington, Mississippi area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Lexington, Mississippi	273A, 292A	273A, 290C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 23, 1989,** and reply comments on or before **November 7, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Linda J. Eckard
Mark N. Lipp
Mullin, Rhyne, Emmons
and Topel, P.C.
1000 Connecticut Ave. N.W.
Washington, D.C. 20036
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in

initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 290C3 are 33-00-00 and 89-53-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-375

In the Matter of

Amendment of Section 73.202(b), RM-6846
Table of Allotments,
FM Broadcast Stations.
(Bozeman, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 15, 1989; Released: September 1, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Northern Sun Corporation (petitioner), requesting the allotment of FM Channel 260C1 to Bozeman, Montana, as that community's third commercial broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 260C1 can be allotted to Bozeman, Montana, in compliance with the minimum distance separation requirements of the Commission's Rules, at the city reference coordinates.[1]

3. In view of the fact that the proposed allotment could provide a third commercial broadcast service to Bozeman, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Bozeman, Montana	229C1, 236C1 *271C2	229C1, 236C1, 260C1, *271C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 23, 1989,** and reply comments on or before **November 7, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis Begley
Reddy, Begley & Martin
2033 M Street, N.W.
Washington, D.C. 20036
(Counsel for the petition)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 260C1 at Bozeman are 45-40-54 and 111-02-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-376

In the Matter of

Amendment of Section 73.202(b), RM-6871
Table of Allotments,
FM Broadcast Stations.
(Aitkin, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 15, 1989; Released: September 1, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition filed by Upper Minnesota Broadcasting Corporation (petitioner), requesting the substitution of FM Channel 232C3 for Channel 232A at Aitkin, Minnesota. Petitioner also requests the modification of its license for Station KEZZ, Aitkin, to specify Channel 232C3 in lieu of Channel 232A. Petitioner stated its intention to construct the necessary facilities for operation on Channel 232C3.

2. We believe petitioner's proposal warrants consideration. Channel 232C3 can be allotted to Aitkin, Minnesota, in compliance with the minmum distance separation requirements of the Commission's Rules at the petitioner's specified site, 8.3 kilometers (5.2 miles) north of the community.[1] We shall also propose to modify the license of Station KEZZ, Channel 232A, to specify operation on Channel 232C3 in accordance with Section 1.420(g) of the Commission's Rules. Since Aitkin is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government is required for this allotment.

3. In order to provide a wide coverage area station for the Aitkin, Minnesota area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Aitkin, Minnesota	232A	232C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 23, 1989,** and reply comments on or before **November 7, 1989** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Timothy K. Brady
P.O. Box 986
Brentwood, Tennessee 37027-0986
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will

be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 232C3 at Aitkin are 46-36-15 and 93-39-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-378

In the Matter of

Amendment of Section 73.202(b), RM-6823
Table of Allotments,
FM Broadcast Stations.
(Leesville, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 18, 1989; Released: September 1, 1989

By the Chief, Allocations Branch:

1. At the request of Stannard Broadcasting Company, Inc. (petitioner), the Commission has before it for consideration a petition for rule making requesting the substitution of Channel 289C3 for Channel 288A at Leesville, Louisiana, and the modification of its license for Station KVVP(FM) at Leesville to specify operation on the higher powered channel. The proposal could provide Leesville with its first expanded FM service.

2. Petitioner states its desire to relocate Station KVVP(FM)'s transmitter site 17.3 kilometers (10.7 miles) south of Leesville.[1] An engineering analysis confirms that Channel 289C3 can be allotted to Leesville at the site specified by the petitioner consistent with the Commission's minimum distance separation requirements.

3. As requested, we shall propose to modify the license for Channel 288A at Leesville to specify operation on Channel 289C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Leesville.

4. In view of the fact that Leesville, Louisiana, could receive its first wide coverage area FM station the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Leesville, Louisiana	224A, 288A	224A, 289C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **October 23, 1989,** and reply comments on or before **November 7, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James J. Popham, Esquire
700 Camp Street
New Orleans, LA 70130
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 30-59-30 and 93-13-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-588

In the Matter of

Amendment of Section 73.202(b), RM-6481
Table of Allotments,
FM Broadcast Stations.
(The Dalles, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 18, 1989; Released: September 1, 1989

By the Chief, Allocations Branch:

1. At the request of Nugent Broadcasting Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 435 (1989), proposing the substitution of Channel 249C2 for Channel 249A at The Dalles, Oregon, and the modification of its license for Station KACI(FM) to specify operation on the higher powered channel. The petitioner filed supporting comments in which it reiterated its intention to apply for the channel, if allotted. No other comments were received.

2. Channel 249C2 can be allotted to The Dalles in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.7 kilometers (6.0 miles) northwest to accommodate petitioner's desired transmitter site.[1] As requested, we will also modify petitioner's license for Station KACI(FM) to specify operation on Channel 249C2.

3. We believe the public interest would be served by substituting Channel 249C2 for Channel 249A at The Dalles, Oregon, since it could enable Station KACI(FM) to expand its coverage area. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 16, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
The Dalles, Oregon	249C2, 283C

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Nugent Broadcasting Corporation for Station KACI(FM), The Dalles, Oregon, IS MODIFIED to specify operation on Channel 249C2 in lieu of Channel 249A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 45-38-54 and West Longitude 121-16-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 1, 1989

AMATEUR SERVICE INTERNATIONAL RADIOCOMMUNICATIONS

The following arrangements have been made for amateur stations to communicate with amateur stations located in other countries.

Permissible countries: Section 97.111 of the Commission's Rules, 47 C.F.R. § 97.111(a)(1), authorizes an amateur station licensed by the FCC to exchange messages with an amateur station located in another country, except with one in any country whose administration has given notice that it objects to such radiocommunications. Currently there are no banned countries.

Types of messages: Section 97.117 of the Commission's Rules, 47 C.F.R. § 97.117, stipulates that amateur station transmissions to a different country, where permitted, shall be in plain language and shall be limited to messages of a technical nature relating to tests, and to remarks of a personal character for which, by reason of their unimportance, recourse to the public telecommunications service is not justified.

Prohibited transmissions: Section 97.113 of the Commission's Rules, 47 C.F.R. § 97.113(a), prohibits an amateur station licensed by the FCC from transmitting any communications the purpose of which is to facilitate the business or commercial affairs of any party, and from transmitting any communications as an alternative to the broadcast, common carrier, maritime, land mobile, or any other authorized radio service. All types of communications related to business activities, including the advertising, solicitating, ordering, furnishing, delivering, accounting, or billing for any supplies, materials, or services, is prohibited.

Third-party arrangements: Section 97.115 of the Commission's Rules, 47 C.F.R. § 97.115(a)(2), authorizes an amateur station licensed by the FCC to transmit messages for a third party to any amateur station within the jurisdiction of a foreign government whose administration has made arrangements with the United States to allow amateur stations to be used for transmitting international communications on behalf of third parties. The following countries have made the necessary arrangements with the United States: Antigua and Barbuda, Argentina, Australia, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, The Gambia, Ghana, Grenada, Guatemala, Guyana, Haiti, Honduras, Israel, Jamaica, Jordan, Liberia, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, Sierra Leone, Swaziland, Trinidad and Tobago, United Kingdom (special event stations with call sign prefix GB followed by a number other than 3), Uruguay, and Venezuela.

The United Nations also has arrangements with the United States to permit an amateur station regulated by the FCC to exchange messages for a third party with amateur stations 4U1ITU in Geneva, Switzerland and 4U1VIC in Vienna, Austria.

No amateur station regulated by the FCC shall transmit messages for a third party to any station within the jurisdiction of any foreign government not listed above. This prohibition does not apply to a message for any third party who is eligible to be the control operator of the station.

Contact: Personal Radio Branch/ssd/prb, Room 5322, (202) 632-4964

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-371

In re Applications of

WILLIAM W. MUENCH (hereafter "Muench") File No. BPH-880126NO

MW MULTICOM INC. (hereafter "MWMI") File No. BPH-880126OI

For Construction Permit
for a New FM Station
on Channel 263A (100.5MHz)
in Willard, Missouri

HEARING DESIGNATION ORDER

Adopted: August 17, 1989; Released: August 31, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. The *Report and Order* in MM Docket No. 87-474, 54 Fed. Reg. 3602 (Jan. 25, 1989), has amended the FM Table of Allotments. 47 C.F.R. § 73.202(b), to change the allotted channel for the instant Willard, Missouri allocation from Channel 263A to 286C2, effective March 3, 1989. Accordingly, the applicant that is awarded the construction permit in this proceeding will be required to submit an amendment in compliance with the *Report and Order* in MM Docket No. 87-474 to the presiding Administrative Law Judge.

3. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Muench and MWMI would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

4. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	DATE AMENDMENT FILED
MWMI	January 3, 1989; January 19, 1989

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Muench and MWMI would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if either.

8. IT IS FURTHER ORDERED, That the applicant that is awarded the construction permit in this proceeding shall submit an amendment in accordance with paragraph 2 hereinabove.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by MWMI ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-380

In re Applications of

LONGHORN BROADCAST LIMITED PARTNERSHIP (hereafter "Longhorn") File No. BPH-871124MD

JOHNNY L. CRAIN AND RICHARD J. MARTINEZ d/b/a ELGIN BROADCASTING (hereafter "Elgin") File No. BPH-871124ML

DYNAMIC RADIO BROADCASTING CORPORATION (hereafter "Dynamic") File No. BPH-871124MR

AUSTIN BROADCASTING COMPANY (hereafter "Austin") File No. BPH-871124MX

WILLIAM ROBERT LUNDGREN (hereafter "Lundgren") File No. BPH-871124MB (PREVIOUSLY DISMISSED)

For Construction Permit
for a New FM Station
on Channel 223A (92.5 MHz)
in Elgin, Texas

HEARING DESIGNATION ORDER

Adopted: August 17, 1989; Released: August 31, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. On August 12, 1988, Lundgren tendered an application to serve Elgin, Texas, on Channel 223A. That application was returned as not sufficient for tender by staff letter on July 15, 1988, because of conflicting information provided in response to Section V-B, Item 7 and Exhibit E-1 of FCC Form 301 (Vertical Plan Sketch). Specifically, the overall height of the tower structure above ground (with lighting) listed in Section V-B is 84.2 meters, which converts to 276 feet (feet = meters x 0.3048). Lundgren listed the inconsistent values of 84.2 meters and 270 feet on the tower sketch supplied with his application. Further, none of these values, when coupled with the site elevation of 570 feet/173.7 meters above mean sea level (AMSL) will give the figures 843 feet or 256.9 meters for the tower height AMSL (including obstruction lighting) listed in the sketch. We were unable to resolve this discrepancy to determine the actual tower height proposed.

3. On August 12, 1988, Lundgren timely filed a petition for reconsideration of our action returning his application. Therein, Lundgren asserts that the foregoing problem was simply caused by a typographical error, resulting in the incorrect overall height of 84.2 meters being given on the tower sketch; the same error was transferred to Item 7, Section V-B of FCC Form 301. Furthermore, petitioner states that the correct overall height of the tower above ground can be confidently derived "from the corresponding figure expressed in terms of height above mean sea level ("AMSL")": the tower sketch shows that the top of the tower is 256.9 meters AMSL and that the base is at 173.7 meters AMSL. The difference between these figures is 83.2 meters, the correct tower height above ground.

4. Petitioner also notes that paragraph 4(e) of Appendix D to the *Report and Order* in Docket 84-750 states that "[a]ntenna height above ground affects the environmental and overall navigation aspects of a facility proposal. This is the *only* reference to overall antenna [tower] height in the foregoing document, and these two factors must be deemed the sole justification for the requirement." Petition for Reconsideration, at 3-4. Petitioner goes on to assert that tower height does not trigger the application of the Commission's environmental rules, and this tower height "does not affect the initial processing of [the Lundgren] application from an environmental standpoint."[1] Furthermore, petitioner asserts that the Commission is concerned at the processing stage only with antenna radiation center, not tower height, and that the only federal authorities concerned with overall tower height are the Commission's Antenna Survey Branch (ASB) and the Federal Aviation Administration (FAA), with the ASB not becoming involved until grant of the construction permit.

5. Initially, with respect to petitioner's claim that the stated reasons for requiring accurate and consistent tower heights AGL are actually irrelevant for processing purposes, we must point out that the *Report and Order* in Docket 84-750 was the result of a full notice and comment Rule Making. Any arguments questioning the reasonableness or usefulness of the data required by that document should have been presented during the Rule Making notice and comment period or on reconsideration following the release of the *Report and Order*. It is inappropriate to consider the necessity of consistent tower height information in a mutually exclusive proceeding over three years after the date of the release of the *Report and Order* in Docket 84-750. Secondly, it is true that tower height AGL, *per se*, is not determinative as to whether or not the proposed tower will have a "significant" environmental impact for the purpose of requiring an Environmental Assessment under the Commission's rules. *See* 47 C.F.R. §§ 1.1306, 1.1307. However, tower height, along with width, nature of proposed lighting, existence of guy wire support, etc. are all factors which may be relevant in determining the environmental impact of a tower in the area or community in which it is to be erected. The rules merely indicate that tower height *alone* is insufficent to warrant environmental processing, not

that tower height is irrelevant. *See* 47 C.F.R. § 1.1306, note 2. Finally, petitioner is simply incorrect in its assertion that the Commission is not concerned with tower height at the processing stage. One of the major delays in application processing is airspace clearance, obtained for the Commission from the FAA by ASB. Delay in approval will, of course, be exacerbated if there are inconsistencies between what is filed with the FAA (on Section V-G of Form 301) and what is filed with the Commission, thus undercutting the entire purpose of the "hard look" processing scheme. Additionally, the Commission will not know which tower height to approve in the construction permit or whether or not the permittee constructed in compliance if the Commission is uncertain as to which figure constitutes the "actual" proposed tower height. Petitioner's assertion with respect to environmental and aeronautical concerns are therefore meritless.

6. With respect to petitioner's claim that the inconsistent tower height listings did not make the application untenderable, we must point out that the Commission specifically addressed the effect of inconsistent information in Appendix D to the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), *recon. denied*, 50 Fed. Reg. 43157 (1985):

> If any information is present, but on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data. In such instances, the defective application will be deemed not sufficient for tender.

Report and Order, *supra*, at 19946.

7. Contrary to Lundgren's allegations, it is impossible to determine the actual tower heights proposed, because the staff could not determine which tower height specifications were accurate and which were erroneous. The *Report and Order* provided in paragraph 2(e) of Appendix D that various antenna heights that must be provided in the application are crucial engineering parameters and must be specified consistently. Further, antenna height above ground affects the environmental and aerial-navigation aspects of a proposed facility. Thus, the failure of an applicant to accurately and consistently list such antenna heights renders the application not substantially complete. Lundgren's responses to Section V-B, Item 7 and Exhibit E-1 showed inconsistent antenna heights and the Commission's staff, drawing on the application as a whole, was not able to resolve the discrepancy confidently and reliably with a high degree of confidence. As a result, the inconsistent information in question made further processing of the application impossible. *See Joanne Brehm*, 1 FCC Rcd 403 (1986). Accordingly, Lundgren's petition for reconsideration will be denied and his application will be dismissed.[2]

8. *Longhorn*. Information before the Commission indicates that Longhorn was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Belle Chasse, Louisiana	88-206
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of the above proceedings: whether or not Sonrise was a real party-in-interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant dismissed its application rather than resolving these issues. These unresolved issues calls into question Longhorn's qualification to be a Commission licensee. Therefore, such issues will be specified against Longhorn in this proceeding.

9. The following applicants have filed petitions for leave to amend their applications on the dates shown. The accompanying amendments were filed after February 16, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANTS	AMENDMENTS FILED
Longhorn	May 9, 1989; July 10, 1989
Dynamic	April 11, 1988
Austin	June 5, 1989

10. Dynamic's April 11, 1988 amendment proposes an effective radiated power (ERP) of 1.8 kW and an antenna height above average terrain (HAAT) of 137 meters. However, staff engineering review indicates that any ERP exceeding 1.6 kW will cause the application to exceed the maximum ERP/HAAT limitations contained in 47 C.F.R. § 73.211 for class A stations. This discrepancy is neither a tenderability nor an acceptability defect insofar as the minimal nature of the defect appears attributable to the imprecision inherent in manually ascertaining from the Commission's propogation curves the exact ERP value corresponding to the maximum permitted under the Rules for the antenna height proposed. The use of an

ERP of 1.6 kW at the proposed 137-meter HAAT does not adversely affect Dynamic's city grade coverage, nor will the application violate any Commission rule or policy by operation at this lower power. Accordingly, Dynamic must amend its application, within 30 days of the release of this Order, to reduce the specified ERP to 1.6 kW. This amendment must also specify any additional engineering information which changes as a result of the reduction in power.

11. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Longhorn.

2. To determine whether Longhorn's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Longhorn possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That that petition for reconsideration filed by Lundgren IS DENIED and his resubmitted application IS DISMISSED.

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Longhorn, Dynamic and Austin ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That Dynamic shall submit the corrective amendment called for in paragraph 10 above, with the Presiding Administrative Law Judge within 30 days of the release of this Order.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] We should point out that, while petitioner Lundgren states now that tower height does not trigger the application of the Commission's environmental rules, the sole reason for Lundgren's certification (§ V-B, Item 20 of its application) that its proposal would not have significant environmental impact under the Rules is that "[n]o construction of over 100.0 m(eters) is proposed."

[2] In order to utilize the Bureau's limited processing staff resources, the Commission has approved staff consideration and disposition of tenderability and acceptability matters in the context of the relevant hearing designation order rather than in a separate action document. *Teton Broadcasting*, 1 FCC Rcd 518 (1986). *See also* 47 C.F.R. § 1.106(a)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-87-81

NATIONAL EXCHANGE
CARRIER ASSOC.,
INC., *et al.*,
Defendants.

ORDER

Adopted: August 14, 1989; Released: September 1, 1989

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On June 30, 1987, AT&T Communications (AT&T) filed formal complaints against, *inter alia*, the National Exchange Carrier Association, Inc., (NECA) and its Local Exchange Carrier (LEC) members. The complaints alleged certain statutory and tariff violations associated with defendants' billing and collection rates for the period July 1, 1985, to December 31, 1986.

2. The parties to the above - captioned complaint have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaint. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached. On August 11, 1988, counsel for AT&T and NECA filed a joint motion seeking dismissal of the complaint with prejudice and authorization of their settlement agreement. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the proposed settlement agreement of the parties IS AUTHORIZED.

4. IT IS FURTHER ORDERED that the joint motion to dismiss the above-captioned complaint IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CELLULAR MARKETING, INC.,
Complainant,

v. File No. E-89-273

HOUSTON CELLULAR TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: August 25, 1989; Released: September 1, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On June 22, 1989, Cellular Marketing, Inc. (CMI) filed a formal complaint with the Commission pursuant to Section 208 of the Communications Act against Houston Cellular Telephone Company (HCTC). CMI alleged that HCTC had violated Sections 201(b) and 202(a) of the Act and the Commission's policies concerning the provision of resale of cellular service. On August 4, 1989, HTCT filed its Answer to the complaint and denied any violation of the Act or Commission policy. HCTC also filed a motion to dismiss the complaint, alleging, *inter alia*, that it is not subject to the complaint provisions in Sections 206 through 209 of the Act. HCTC also filed a motion to stay discovery in this proceeding pending disposition of its motion to dismiss. Alternatively, HCTC seeks a stay of the proceeding, including discovery, pending resolution of an action before a Texas state court. CMI timely filed an opposition to the motion for stay on August 10, 1989.

2. As a cellular licensee of the Commission, HCTC is subject to its policies and orders prohibiting restrictions on resale of its service. *Cellular Communications Systems*, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58, *further modified*, 90 FCC 2d 571 (1982), *petition for review dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. Mar. 3, 1983) (*Cellular Resale*). HCTC also is subject to Sections 208 and 209 of the Act for any conduct in violation of the Act or a Commission order or rule even assuming *arguendo*, that it was merely a "connecting carrier" within the meaning of 47 U.S.C. § 153(u) as it contends. *Com Services v. Murraysville Telephone Co.*, FCC 85-553, at para. 14 (released October 17, 1985). *See also CCI Cablevision*, 103 FCC 2d 600, 611 at n.24 (1985), *remanded for clarification on other grounds sub nom., Northwestern Indiana Telephone Co. v. FCC*, 824 F.2d 1205 (D.C. Cir. 1987), *clarified on remand*, 3 FCC Rcd 3096 (1988), *petition for review denied, Northwestern Indiana Telephone Co. v. FCC*, No. 88-1521, *slip op.* (D.C. Cir. Apr. 11, 1989), *petitions for rehearing* and *for rehearing en banc denied*, (D.C. Cir. June 27, 1989).

3. In determining whether or not to grant a stay request, the Commission generally considers the following four factors: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? (2) Has the petitioner shown that without the requested relief, it will be irreparably injured? (3) Would issuance of a stay substantially harm other parties interested in the proceedings? (4) What action is in the public interest? *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Big Valley Cablevision, Inc.*, 85 FCC 2d 973, 978 (1981); *Comark Cable Fund III*, 104 FCC 2d 451, 456 (1985).[1] HCTC has not made the requisite showing for the extraordinary relief that it seeks.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules 47 C.F.R. § 0.291, that "Defendant's Motion to Stay" filed by Houston Cellular Telephone Company on August 4, 1989 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] *See Also* Amendment of Rules Governing Procedures to be Followed Where Formal Complaints Are Filed Against Common Carriers, 3 FCC Rcd 1806, 1811 (1988) (holding discovery in abeyance pending disposition of procedural matters is contrary to FCC policy).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

ROBERT E. CONN — File Nos. EID-665
FRANZ-ANTON — EID-666
GLASER

For authority under Section 212 of the Communications Act of 1934, as amended, to hold the position of officer or director of more than one carrier subject to the Act.

ORDER

Adopted: August 24, 1989; Released: September 1, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. We have for consideration applications filed on behalf of Robert E. Conn and Franz-Anton Glaser on June 23, 1989, for authorization under Section 212 of the Communications Act of 1934, as amended, 47 U.S.C. § 212, and Sections 62.1(a) and 62.11 of the Commission's Rules, 47 C.F.R. §§ 62.1(a) and 62.11, to serve as an officer and/or director of both Houston International Teleport and World Communications, Inc. (Worldcom).

2. Mr. Conn is a vice president and director of Worldcom which became a common carrier subject to the Act on April 24, 1989, when it acquired the international private line business of Western Union Corporation. Mr. Conn also holds the positions of director and Secretary of Tele-Columbus USA, Inc. (TC-USA) which is the holding company owning all of the stock of Worldcom.

3. Mr. Conn seeks authorization to serve as a director of Houston International Teleport, Inc. (HIT), which wholly owns Satellite Transmission and Reception Specialist Company (STARS), a common carrier subject to the jurisdiction of the Commission, while continuing to serve with Worldcom and TC-USA. The applicant states that he has no financial interest in any of these companies and grant of the authority sought will not adversely affect either public or private interests because Worldcom and STARS, for the most part, operate in different common carrier markets. To the small extent that there might be any overlap in the Intelsat Business Service sector between Worldcom and HIT, Mr. Conn states that it is insignificant because both Worldcom and STARS are dwarfed by such competitive giants in this sector as AT&T and MCI. Furthermore, applicant states that he is not engaged in the active management of either Worldcom, STARS or HIT and, in the unlikely event of any potential conflict of interest between his duties as a director of Worldcom and as a director of HIT, he will abstain from participation with respect to such matters.

4. Mr. Glaser is a director of Worldcom and the Chairman, Chief Executive Officer and Director of TC-USA. He also seeks authorization to serve as a director of HIT while serving as a director of Worldcom and TC-USA. Like Mr. Conn, he has no financial interest in any of the above companies and would likewise abstain from participation on the HIT board in the event of any potential conflicting matters between his duties as a director of Worldcom and HIT.

5. The applications were placed on public notice July 13, 1989 and no oppositions have been filed. In determining whether public or private interests will be adversely affected, the Bureau considers several different factors, including but not limited to, the potential for anticompetitive conduct, a possible diminution in the independence of each carrier involved, or the possibility of conflicts of interest on the part of common directors or officers in violation of the fiduciary duties imposed upon persons occupying those positions. *See In re Application of Walter S. Gifford*, 2 FCC 741 (1935). Upon consideration of the facts and circumstances presented by these applications, we find that Messrs. Conn and Glaser have made satisfactory showings as required by law that the public and private interests will not be adversely affected by granting the requested authorizations.

6. Accordingly, IT IS ORDERED, pursuant to authority delegated in 47 C.F.R. § 0.291 that the applications of Robert E. Conn, EID 665, and Franz-Anton Glaser, EID 666, ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 28, 1989

AT&T PETITIONS FOR MODIFICATION OF COMMISSION PROCEDURES FOR PRESCRIBING ITS DEPRECIATION RATES; FILES PROPOSED REVISED DEPRECIATION RATES

Pleading Cycle Established

On February 15, 1989, American Telephone and Telegraph Co. (AT&T) filed a petition seeking changes in the manner in which the Commission prescribes AT&T's depreciation rates. AT&T asserts that new procedures are required because the Commission's present depreciation practices have failed to produce depreciation expenses and reserves for AT&T that reflect the "dynamic nature of the marketplace for interexchange competition." Specifically, AT&T asks that the Commission permit AT&T to set its depreciation rates for regulatory reporting purposes based on the depreciation rates it uses for financial reporting purposes. To accomplish this, AT&T states that the Commission should, on an ongoing basis, allow AT&T to seek represcription whenever its financial reporting depreciation rates change, and apply depreciation rates to plant categories on a nationwide, rather than state-by-state, basis.

AT&T also filed a schedule of proposed depreciation rates that it requests be prescribed effective January 1, 1989. AT&T states that its current depreciation reserve for regulatory purposes does not reflect the value of its plant, and that it should be allowed an opportunity to align that reserve level with its financial reporting depreciation reserve. AT&T states that the proposed depreciation rates would recover the difference in reserve levels in five years. AT&T accompanied its request for represcription of depreciation rates with supporting material required by Section 43.43 of the Commission's rules, and requested proprietary treatment of certain documentation.

Parties may file comments on AT&T's petition and on its proposed schedule of depreciation rates no later than **September 25, 1989.** Replies should be filed by **October 11, 1989.** Comments should refer to file number AAD 9-1935. Comments on AT&T's petition should be limited to depreciation rates and prescription procedures applicable only to AT&T.

Copies of AT&T's petition and its schedule of proposed depreciation rates may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washington, DC 20036, (202) 857-3800. Copies are also available for public inspection and copying in the Accounting and Audits Division reference room, Room 812, 2000 L Street, N.W., Washington, DC.

For further information, contact Fatina Franklin or Robert W. Spangler, (202) 632-7500.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS, INC. Transmittal No. 543
Revisions to Tariff F.C.C. No. 1

Accounting Rate for Call USA
International Long Distance Service

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 1989; Released: August 28, 1989

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. Transmittal No. 543, which was filed by MCI Telecommunications Corporation (MCI) on June 16, 1989, revises MCI Tariff F.C.C. No. 1 to add Spain as a country from which travellers may terminate calls in the United States. Specifically, MCI's CALL USA service would enable a caller using any telephone in Spain to call a toll-free number and be connected with an MCI operator in the United States. That operator, in turn, would forward the telephone call to its destination.

2. American Telephone and Telegraph Company (AT&T) filed a petition to reject or suspend and investigate the tariff on June 23, 1989 (AT&T Petition). On that same date, AT&T also filed an informal protest (AT&T Protest) asserting that MCI's ability to make the new tariffed offering results from actions that are in contravention of the Commission's International Settlements Policy (ISP).[1] MCI filed a reply on June 30, 1989 (MCI Reply); AT&T responded to MCI's reply on July 25, 1989 (AT&T Response). Transmittal 543 is scheduled to become effective on September 1, 1989.

II. SUMMARY OF PLEADINGS

A. *AT&T Petition To Reject or Suspend*

3. AT&T alleges that MCI's tariff is unlawful because it constitutes an unreasonable practice in contravention of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). First, argues AT&T, MCI would be offering an International Long Distance (ILD) option that conflicts with the ISP in that Telefonica, the Spanish telecommunications carrier, denies a competing United States carrier equivalent access because the competing carrier refused to pay the same unlawfully high accounting rates. AT&T Petition at 3. Second, AT&T says, MCI cannot commence service without instituting the accounting rates for this option and cannot institute the new accounting rates because it has failed to serve an accounting rate notification on AT&T as required by the ISP. *Id.* Third, AT&T argues that even if MCI's tariff filing itself could be deemed notification, the establishment of an effective date of July 1 (the originally scheduled effective date for Transmittal 543) is an unreasonable practice because the accounting rates used for the settlement of calls cannot take effect for 21 days after notification. *Id.* at 3-4.

4. AT&T also argues that competition would be harmed if Transmittal 543 becomes effective because AT&T would be denied access to 99 percent of the telephones in Spain due to AT&T's refusal to pay the higher accounting rate. AT&T further contends that the public will not be harmed in any substantial way if MCI's CALL USA calls cannot be placed during the period it takes to resolve this issue because callers have at least two other options for completing calls to the United States from Spain. In contrast, AT&T observes, it will suffer irreparable injury because MCI will be able to obtain an exclusive right to utilize United States operators on telephone calls placed from virtually any telephone in Spain. According to AT&T, holders of AT&T calling cards will need to obtain MCI cards if those customers wish to place credit card calls through United States operators. Finally, AT&T alleges that rejection or suspension of the tariff filing is in the public interest; to permit the tariff to go into effect would, condone the practice of "whipsawing"[2] and defeat the Commission's goal of promoting competition. *Id.* at 2-7.

B. *AT&T Protest*

5. The AT&T informal protest reiterates that AT&T has not received any notification from MCI regarding these non-uniform rates as required by the ISP. AT&T Protest at 1. AT&T contends that the only reason MCI was able to offer CALL USA is that MCI negotiated an accounting rate with Telefonica that is higher than the rate AT&T has negotiated with Telefonica for AT&T USADIRECT service. According to AT&T, MCI agreed to pay Telefonica an accounting rate equivalent to 1.95 Special Drawing Rights (SDRs) for peak traffic and 1.55 SDRs for off-peak traffic. In contrast, AT&T contends, AT&T has an agreement with Telefonica under which the ILD accounting rate AT&T will pay is 1.60 SDRs for peak traffic and 1.20 SDRs for off-peak traffic. *Id.* at 2.

6. AT&T says the MCI accounting rates have been extracted through "whipsawing" and argues that Telefonica is using those higher accounting rates to pressure AT&T to accede to the same rates. According to AT&T, Telefonica is exerting this pressure by granting dial access for MCI's CALL USA from any telephone in Spain while denying AT&T's repeated requests for the same access for USADIRECT unless AT&T agrees to the higher accounting rate. *Id.*

7. AT&T further asserts that Telefonica is able to take advantage of its position as the sole provider of telecommunications services in Spain and between Spain and the United States to exercise complete control over the Spanish telecommunications marketplace. AT&T contends that as a result, Telefonica has used its market power to shift the benefits of United States competition (and of revenues) to itself, to the detriment of the public interest. AT&T maintains that the ISP was designed to prevent such practices. According to AT&T, the Commission decided to exercise oversight of non-uniform accounting rates precisely to protect United States carriers and the public from the detrimental effects of the abuse of monopoly power by foreign carriers. *Id.* at 3.

8. Finally, AT&T contends that unless the Commission acts, AT&T will be forced either to discontinue its USADIRECT calling from Spain or to offer that service on a severely restricted basis. AT&T believes its only alternative is to accede to the "whipsaw" by paying "unjustified" higher accounting rates. AT&T states that either of these alternatives is unacceptable. *Id.* [3]

MCI Reply

9. The MCI reply asserts that the "anti-whipsawing" provision of the ISP is not applicable because the ISP only applies if more than one carrier offers a comparable service to a particular foreign jurisdiction. MCI maintains that its CALL USA Service from Spain is totally different from any comparable AT&T service, including USADIRECT. MCI cites as a difference the fact that its service is available from all telephones in Spain while AT&T's service is limited to 10 dedicated telephones. In addition, MCI states that Telefonica considers AT&T's USADIRECT as "experimental" and "transitory." MCI Reply at ii.

10. MCI further maintains that the purpose of the ISP is to serve the public interest, not the interest of AT&T. Moreover, MCI contends, the ISP is not relevant here because ISP applies to "services where more than one carrier or service provider offers a particular service to a particular foreign jurisdiction." *Id.* at 6. MCI also asserts that its CALL USA serves the public interest by providing United States citizens travelling in Spain access to English-speaking operators from any telephone. *Id.* at 8. Finally, MCI claims its CALL USA will increase international comity; it contends that Telefonica agreed with MCI that CALL USA is needed to service the growing number of United States citizens who travel to Spain. MCI maintains that rejecting or suspending MCI's tariff filing "would be tantamount to denying Spain's presence in the international telecommunications community." *Id.* at 10.

III. DISCUSSION

11. On June 27, 1989, the Chief, International Facilities Division, informed MCI that if it wished to establish a non-uniform accounting rate with Spain, MCI must file an appropriate notification with the Commission for review under the ISP.[4] That letter also noted that under existing Commission procedures MCI cannot legally implement this service with Spain until MCI complies with the notification requirement and the Commission permits MCI to implement the non-uniform accounting rate.

12. On June 30, 1989, MCI responded that MCI does not believe that it has established a non-uniform accounting rate with Spain. Therefore, MCI asserts, it is under no obligation to file a notification for review under the ISP. MCI adds that it believes its service, MCI CALL USA, is fundamentally different from AT&T's USADIRECT Service and that MCI fully supports the ISP and intends to continue to comply with Commission rules and regulations. On July 7, 1989,[5] MCI supplemented its response with a letter from Telefonica in which the latter claims it does not consider AT&T's USADIRECT to be a service but merely a trial offering for which there is no accounting agreement. As a result, MCI asks the Bureau to reconsider the conclusions apparently reached in the letter of June 27, 1989.

13. On July 25, 1989, AT&T filed a response to MCI's submissions,[6] asserting that adoption of MCI's position would be tantamount to accepting the proposition that the ISP can be ignored whenever a United States carrier chooses to do so by acceding to a demand in return for a benefit that gives the carrier preferential access.[7] AT&T states that MCI's argument must be rejected because the AT&T and MCI services are materially the same and are subject to scrutiny under the ISP. Furthermore, when two carriers provide the same service but settle at different accounting rates, AT&T maintains, the ISP requires rejection of the higher accounting rate that has been extracted in return for promises of benefits within the exclusive control of the foreign carriers. AT&T argues that MCI's primary basis for the position that the services are different -- that AT&T's service is available from only 10 telephones -- is true, but irrelevant. AT&T states that both services are functionally equivalent to the other in satisfying the need of American consumers in Spain to make "plain old" voice calls to the United States through United States operators at United States tariffed rates.[8]

14. The *Report and Order* in the ISP proceeding[9] concluded that traditional Commission oversight of United States carriers' arrangements with foreign telecommunications administrations in the context of the Commisison's rules concerning international settlements should be expressly extended to include international voice services.[10] Specifically, the Commission concluded that each proposed modification of the terms, rates, or toll divisions of operating agreements for services which more than one carrier or service provider offers to a particular foreign jurisdiction must be submitted to the Commission and would be placed on public notice. The Commission decided to permit carriers to implement such modifications within a 60-day period absent showings of demonstrable abuse of the policy requiring uniform settlement rates or demonstrable detriment to the public interest.[11] On reconsideration, the Commission retained the notification requirement for switched voice services, but provided for a 21-day notice period to allow Commission review of the accounting rate change before such a change is implemented.[12]

15. MCI has not complied with the Commission's notification requirements under the ISP in establishing of a non-uniform accounting rate with Telefonica. Specifically, we conclude that MCI has failed to demonstrate that MCI's CALL USA is fundamentally different from either AT&T's USADIRECT service or other international message telephone services (IMTS) to Spain. There is, therefore, no basis for MCI's assertion that its offering is not subject to the notification requirements established by the Commission for non-uniform international accounting rates. We cannot agree with MCI that its CALL USA service is different from AT&T's USADIRECT service simply because MCI's service is available from any telephone in Spain, while AT&T's service is available only from a few dedicated telephones in Spain. Nor do we consider Telefonica's view -- that it views USADIRECT as a "transitory" and "experimental" service -- to be the appropriate basis for a Commission assessment of the nature of these services for the purposes of the Commission's ISP.

16. In conclusion, we find that MCI has failed to demonstrate that its CALL USA service with Telefonica is different from any comparable IMTS service, including AT&T's USADIRECT service, and therefore not subject to

the notification requirements of the ISP. As a result, as noted in the June 27, 1989, letter from the Chief, International Facilities Division, should MCI wish to implement a non-uniform accounting rate for its CALL USA service to Spain, MCI must file an appropriate request for waiver with the Commission for review under the ISP. Because MCI has not done so, we find that implementation of MCI's tariff revisions would violate applicable Commission rules. Accordingly, we reject MCI's tariff revisions for its CALL USA service to Spain.

IV. ORDERING CLAUSES

17. Therefore, IT IS ORDERED that the petition for rejection or suspension of MCI Telecommunications Corporation Tariff F.C.C. No. 1, Transmittal No. 543, filed by American Telephone and Telegraph Company IS GRANTED to the extent indicated herein, and the tariff IS REJECTED.

18. IT IS FURTHER ORDERED that MCI Telecommunications Corporation SHALL FILE tariff revisions not later than September 5, 1989, to become effective on one day's notice, in order to remove rejected and unlawful material from its tariff. For this purpose, Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived and Special Permission No. 89 - is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Implementation and Scope of the International Settlements Policy for Parallel International Communications Routes, Report and Order, CC Docket No. 85-204, 51 Fed. Reg. 4736 (1986) (*Report and Order*); Order on Reconsideration, CC Docket No. 85-204, 2 FCC Rcd 1118 (1987) (*Reconsideration Order*).

[2] "Whipsawing" describes the manipulation of multiple United States carriers for purposes of obtaining more favorable rates. Generally, "whipsawing" occurs when a foreign Postal Telephone and Telegraph Administration (PTT) seeks modification of an accounting rate in a manner more favorable to the PTT -- that is, a reduction in the rate paid by the PTT to the United States carriers, or an increase in the rate paid by the carriers to the PTT for delivery of traffic in that foreign country. *See Reconsideration Order*, 2 FCC Rcd at 1118.

[3] On August 10, 1989, MCI filed Application No. 178, seeking special permission to advance the effective date of Transmittal Nos. 543, 545, and 547. MCI alleged in its application that AT&T was pursuing and concluding negotiations with Telefonica for the purpose of achieving an agreement at the same accounting rate level agreed to by MCI. On August 11, 1989, AT&T filed with the Commission a notice of its intent to change the accounting rates for its USADIRECT option with Spain. AT&T's filing stated that AT&T had also reached agreement to introduce Spain-Direct Service and two-way International 800 Service between the United States and Spain. *See* AT&T International Settlements Policy Notification, filed Aug. 11, 1989, at 1; *see also* MCI Application for Special Permission No. 179, filed Aug. 21, 1989.

[4] Letter from Chief, International Facilities Division, Common Carrier Bureau, FCC, to J. Cooper, Regulatory Counsel, MCI, June 27, 1989.

[5] Letter from D. Elardo, Associate Regulatory Counsel, MCI, to Chief, International Facilities Division, Common Carrier Bureau, FCC, July 7, 1989.

[6] By letter of July 17, 1989, AT&T requested an extension of time from July 17, 1989, until July 31, 1989, to file its response to MCI's reply. Letter from D. Ritchie, General Attorney, AT&T to the Secretary, FCC, July 19, 1989. MCI opposed the request. Letter from D. Elardo, Associate Regulatory Counsel, MCI, to the Secretary, FCC, July 20, 1989. The Chief, International Facilities Division, granted AT&T an extension of time to file a response until July 25, 1989. Letter from Chief, International Facilities Division, Common Carrier Bureau, FCC, to D. Ritchie, General Attorney, AT&T, July 20, 1989.

[7] Letter from M. Deal, Attorney, AT&T, to Secretary, FCC, July 25, 1989 (AT&T Response).

[8] *Id.*

[9] *Report and Order* at para 36.

[10] *Id.* at para. 35.

[11] The Commission noted that this period for review would permit a 21-day period for filing of oppositions or comments, a 10-day period for reply comments, and a 29-day period for staff review. *Id.* at para. 48.

[12] Carriers are also required to serve notice concurrently on all carriers providing service to the same foreign point. *Reconsideration Order*, 2 FCC Rcd at 1122.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Tariff F.C.C. Nos. 1 and 2

AT&T MEGACOM AND MEGACOM 800 SERVICE in Hawaii

Transmittal No. 1638

ORDER

Adopted: August 23, 1989; Released: August 25, 1989

By the Chief, Common Carrier Bureau:

1. On June 7, 1989, American Telephone and Telegraph Company (AT&T) filed the above-captioned transmittal to incorporate Hawaii into its distance sensitive rate structure for Megacom and Megacom 800 Services. Alascom, Inc. (Alascom) filed a petition to suspend and investigate on June 23, 1989. AT&T filed a reply on June 30, 1989. The proposed revisions are to take effect on August 28, 1989.

2. Alascom alleges that AT&T is unlawfully discriminating against it because AT&T, as of July 1, 1989, began to apply a transit charge of $.31 to all Megacom calls from Alaska to Puerto Rico and the Virgin Islands. Alascom Petition at 3-6. This transit charge, Alascom continues, will virtually foreclose Megacom service between Alaska and Puerto Rico/Virgin Islands. Alascom acknowledges, however, that this transit charge is not currently set out in AT&T's tariffs and was not proposed in Transmittal 1638. *Id. at 3.*[1]

3. AT&T responds that Alascom's petition is inappropriate because Transmittal 1638 does not address or affect the currently effective rates between Alaska and Puerto Rico/Virgin Islands. AT&T Reply at 1-2. In addition, AT&T accuses Alascom of similarly abusing previous proceedings before the Commission by petitioning against Megacom rates from Alaska to Puerto Rico/Virgin Islands when those rates were not at issue.[2]

4. The Common Carrier Bureau has reviewed the tariff transmittal and the various pleadings. We conclude that no compelling argument has been presented that the tariff transmittal is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.[3]

5. Therefore, IT IS ORDERED that the petition to suspend and investigate filed by Alascom, Inc., against AT&T Communications Tariff F.C.C. Nos. 1 and 2, Transmittal No. 1638, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] In addition, Alascom incorrectly challenges the pricing of Megacom rates from Puerto Rico to Hawaii. AT&T does not offer Megacom service from Puerto Rico *See* Alascom Petition at 4-5; *see also* AT&T Reply at 3.

[2] *See* AT&T Communications, Transmittal No. 1618, DA 89-752, released June 30, 1989. This Bureau determined that Alascom's challenge to Transmittal 1618 was inappropriate because that transmittal did not modify the Alaska to Puerto Rico/Virgin Islands Megacom rates. *Id.* at para. 62.

[3] AT&T correctly asserts that Alascom's petition fails to address the merits of Transmittal 1638. Issues relating to currently effective rates are properly raised through the complaint process pursuant to Section 208 of the Communications Act rather than petitions to investigate new tariff transmittals pursuant to Section 204 of the Act.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-417

In the Matter of

Amendment of Section 73.202(b), RM-6295
Table of Allotments,
FM Broadcast Station.
(Idalia, Colorado)

REPORT AND ORDER

Adopted: August 15, 1989; Released: September 5, 1989

By the Chief, Allocations Branch:

1. The Commission has before it a *Notice of Proposed Rule Making*, 3 FCC Rcd 5257 (1988), proposing the allotment of Channel 231A to Idalia, Colorado, as a first local broadcast service. Virginia K. Cutforth, the petitioner for the Idalia allotment, filed comments and stated her intention to apply for the channel, if allotted.

2. A staff engineering analysis indicates that Channel 231A can be allotted to Idalia in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 20, 1989** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Idalia, Colorado	----	231A

4. The window period for filing applications for Channel 231A at Idalia will open on **October 23, 1989,** and close on **November 22, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

6. For further information concerning this proceeding, contact Ordee Pearson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates for Channel 231A at Idalia are 39-42-06 and 102-17-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-377

In the Matter of

Amendment of Section 73.202(b), RM-6876
Table of Allotments,
FM Broadcast Stations.
(Waite Park, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 15, 1989; Released: September 5, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Ronald J. Linder (petitioner), requesting the substitution of FM Channel 279C3 for Channel 279A at Waite Park, Minnesota. Petitioner also requests modification of its construction permit (BPH-880826MI) for Channel 279A, to specify Channel 279C2.

2. We believe petitioner's proposal warrants consideration. Channel 279C3 can be allotted to Waite Park, Minnesota, in compliance with the Commission's Rules at petitioner's specified site.[1] We shall also propose to modify the construction permit of Ronald J. Linder to specify operation on Channel 279C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for the Waite Park, Minnesota area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules as follows:

	Channel No.	
City	Present	Proposed
Waite Park, Minnesota	279A	279C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 27, 1989,** and reply comments on or before **November 13, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ronald J. Linder
Genesis Broadcast Complex
1986 Julep Road
P.O. Box 5119
St. Cloud, Minnesota 56302

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 279C3 are 45-28-03 and 94-09-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-381

In the Matter of

Amendment of Section 73.202(b), RM-6739
Table of Allotments,
FM Broadcast Stations.
(Amarillo, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 22, 1989; Released: September 5, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Amarillo Community Broadcasting Company (petitioner), requesting the allotment of Channel 265C1 to Amarillo, Texas. Petitioner states it intends to apply for the channel, if allotted. Channel 265C1 can be allotted to Amarillo consistent with the Commission's minimum separation requirements.[1]

2. In view of the fact that Amarillo, Texas, could receive an additional FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Amarillo, Texas	226C1, 231C, 245C, 250C, 254C1, 270C, 275C1	226C1, 231C, 245C, 250C, 254C1, 265C1, 270C, 275C1

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **October 27, 1989,** and reply comments on or before **November 13, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Richard J. Hayes, Jr., Esquire
1359 Black Meadow Road
Spotsylvania, VA 22553
(Counsel for petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The city reference coordinates are 35-12-30 and 101-50-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-383

In the Matter of

Amendment of Section 73.202(b), RM-6917
Table of Allotments,
FM Broadcast Stations.
(Cambridge, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 22, 1989; Released: September 5, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Monday Media, Inc. (petitioner), requesting the substitution of FM Channel 287C3 for Channel 288A at Cambridge, Minnesota. Petitioner also requests modification of its license for Station KXLV, Channel 288A, to specify operation on Channel 287C3.

2. We believe petitioner's proposal warrants consideration. Channel 287C3 can be allotted to Cambridge, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules.[1] Since Cambridge is located within 320 kilometers of the U.S.-Canadian border, concurrence of the Canadian government will be obtained. We shall also propose to modify the license of Station KXLV, Channel 288A, to specify operation on Channel 287C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the fact that the proposed allotment could provide a wide coverage area station for the Cambridge, Minnesota area, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Cambridge, Minnesota	288A	287C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 27, 1989,** and reply comments on or before **November 13, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Steven A. Lerman
Sally A. Buckman
Leventhal, Senter & Lerman
2000 K Street, N.W., Suite 600
Washington, D.C. 20006
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 287C3 at Cambridge are 45-26-40 and 93-11-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-382

In the Matter of

Amendment of Section 73.202(b), RM-6753
Table of Allotments,
FM Broadcast Stations.
(Blue Earth, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 22, 1989; Released: September 5, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by KBEW, Inc. (petitioner), seeking the allotment of FM Channel 251A to Blue Earth, Minnesota, as that community's second FM broadcast service. Petitioner filed a supplement to its petition requesting the allotment of Channel 251C3 instead of Channel 251A. Petitioner provided an engineering study in support of the proposal and indicated it would file an application for Channel 251C3.

2. We believe petitioner's proposal warrants consideration. However, to avoid the need for comparative consideration with a new proposal to substitute Channel 251C2 for Channel 251A at Emmetsburg, Iowa (RM-6798), we shall propose the allotment of Channel 270C3 instead of Channel 251C3 to Blue Earth, Minnesota. Channel 270C3 can be allotted to Blue Earth, Minnesota, in compliance with the spacing requirements provided there is a site restriction 19.0 kilometers (11.8 miles) northwest of the community.[1] The site restriction will prevent a conflict with Station KNWS-FM, Channel 270C, Waterloo, Iowa.

3. In view of the fact that the proposed allotment could provided a second FM broadcast service to Blue Earth, Minnesota, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commissions' Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Blue Earth, Minnesota	283C2	270C3, 283C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 27, 1989,** and reply comments on or before **November 13, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David E. Hilliard
Edward A. Yorkgitis, Jr.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(Counsel for KBEW, Inc.)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 270C3 at Blue Earth are 43-43-15 and 94-18-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-49

In the Matter of

Amendment of Section 73.202(b), RM-5866
Table of Allotments,
FM Broadcast Stations.
(Gladstone, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 21, 1989; Released: September 5, 1989

By the Chief, Allocations Branch:

1. The Commission herein considers its *Notice of Proposed Rule Making*, 3 FCC Rcd 967 (1988), issued in response to a request filed by David C. Schaberg (petitioner), permittee of Station WWTM, Channel 288A, Gladstone, Michigan, proposing the substitution of Channel 288C1 for 288A and modification of the permit accordingly. Petitioner filed supporting comments. MW Multicom Inc. ("Multicom") filed opposition comments. Woodward Communications, Inc. filed comments. Petitioner filed reply comments.

2. Multicom, licensee of WCHT(AM) and WGLQ(FM), Escanaba, Michigan, opposes the upgrade, stating that petitioner's permit for Channel 288A will expire prior to the conclusion of this proceeding leaving a request for an upgrade of an unauthorized facility. According to Multicom, petitioner will not be entitled to another extension of his permit, no progress has been made towards construction of his authorized facilities, and petitioner claims some equipment on hand and that he has an option on a studio location. Multicom argues that such vague assertions do not rise to the level of substantial progress justifying an extension, and because no other party can express interest in the allotment until the existing permit is cancelled, the proposal advanced in this proceeding must be rejected as moot.

3. Woodward Communications, Inc. (Woodward) filed comments in response to the *Notice*. Woodward is the licensee of FM Station WAPL-FM, Channel 289C, Appleton, Wisconsin. Woodward does not oppose the allotment at Gladstone provided the site restriction 31.9 kilometers north of the community as proposed in the *Notice* is imposed.

4. Petitioner, in reply comments, states that the rule making was initiated for the express purpose of providing service to a larger area. Petitioner states that he has been candid in his application for extension of time to construct, stating that construction has not taken place due mainly to the fact that a different tower location would be required for the Class C facility than for the Class A. Petitioner argues that economics determine that the Class A station should not be built only to have to tear it down within two years to build a new Class C facility at a different location.

5. We believe the public interest would be served by the substitution of Channel 288C1 for Channel 288A at Gladstone, Michigan, since it could provide the community with its first wide area coverage FM service. Petitioner filed the petition for rule making to upgrade at the earliest possible moment, which required additional time to allow for the rule making proceeding. In recognition of Commission policy to encourage its broadcast licensees to upgrade their facilities, three requests for extension of time to construct the facilities for Station WWTM have been granted.[1] The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided there is a site restriction 31.9 kilometers north of the community. The site restriction will prevent a conflict with Station WRLO-FM, Channel 287C1, Antigo, Wisconsin and Station WAPL-FM, Channel 289C, Appleton, Wisconsin.[2] Concurrence of the Canadian government has been obtained since Gladstone, Michigan is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

6. We have authorized a modification of petitioner's permit for Station WWTM, Gladstone, Michigan, to specify operation on Channel 288C1 in accordance with Section 1.420(g) of the Commission's Rules.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 20, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Gladstone, Michigan	288C1

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the permit of Station WWTM, Gladstone, Michigan, IS MODIFIED TO SPECIFY operation on Channel 288C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy & Rules Division
Mass Media Bureau

FOOTNOTES

[1] The first request was granted on March 12, 1987 (BMPH-861120JE) and the second request on December 29, 1987 (BMPH-870831JV). The third request was filed on June 24, 1988, and granted on August 16, 1988 (BMPH-880624TJ). Petitioner filed a fourth extension request on January 24, 1989 (BMPH-890124JQ).

[2] The coordinates for Channel 288C1 at Gladstone are 46-07-50 and 86-56-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Applications of certain
broadcast stations serving
communities in the state of
Texas

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1989; Released: September 1, 1989

By the Commission:

1. The Commission has before it for consideration: (i) a "Petition to Deny" filed July 1, 1988 by the Amarillo Branch of the NAACP, the Victoria County Branch of the NAACP, the Abilene - Taylor County Branch of the NAACP and the National Black Media Coalition (hereafter "NAACP/NBMC")[1] against the license renewal applications of certain broadcast stations serving communities in the state of Texas;[2] (ii) opposition pleadings from the licensees; (iii) NAACP/NBMC's reply; and (iv) various related pleadings.[3]

2. **PROCEDURAL MATTERS**. KAMR-TV and KVII-TV contend that NAACP/NBMC lack standing to file this petition because the supporting statements of local viewers, with one exception, were not timely filed. Section 309 (d)(1) of the Act states that a petition must allege specific allegations of fact sufficient to show that the petitioner is a party in interest as supported by affidavits or statements under penalty of perjury. 47 U.S.C. Section 309 (d)(1); *See also American Legal Foundation v. FCC*, 808 F.2d 84, 90-91 (D.C. Cir. 1987). The NAACP submitted statements from members who are viewers and local residents of the service areas of stations KTAB-TV, KAMR-TV and KVII-TV;[4] however, only the statement pertinent to KTAB-TV was timely filed. As we have stated in the past, late affidavits will no longer be countenanced. *See Applications of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988). Accordingly, we find that the NAACP is a petitioner as to KTAB-TV only and an informal objector as to the other stations. Although NBMC timely filed a statement from Mr. Pluria Marshall, a resident of Washington, D.C., in support of the petition, we note that Mr. Marshall is neither a viewer nor a resident of the areas in which the stations operate. Therefore, we hold that NBMC is an informal objector as to all of the stations.

3. **PLEADINGS**. NAACP/NBMC charge that the EEO program and employment profile of each of the challenged stations reveal that the licensees have not complied with the Commission's EEO rule (Section 73.2080) or policies regarding Blacks.[5] NAACP/NBMC allege that the stations failed to have more than token employment of Blacks during most of the license term, and that the proposed EEO programs submitted by the licensees appear ineffective. NAACP/NBMC therefore request that the Commission investigate the EEO practices of the challenged stations pursuant to *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*),[6] designate their applications for an evidentiary hearing, and deny each.

4. The licensees deny all of the general allegations and maintain that NAACP/NBMC have failed to present evidence of noncompliance with the Commission's rule or policies. The licensees, therefore, request unconditional renewal of the licenses.

5. The factual allegations of the petition are derived entirely from the stations' EEO programs and annual employment reports. Review of the EEO records of the challenged stations reveals that an unconditional grant of any of the applications (with the possible exception of Station KTAB-TV) would have been prima facie inconsistent with the public interest.[7] Absent a satisfactory explanation from each licensee (again, with the possible exception of KTAB-TV), substantial and material questions of fact would remain such that the Commission would be unable to find that a grant, even with some kind of EEO conditions, would serve the public interest. 47 U.S.C. Section 309 (d)(2).

6. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's on-going assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by a licensee.

7. When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, it is granted, if otherwise appropriate. When the application indicates an inadequate record of EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, the submission of a modified EEO program, renewal for less than a full term, a forfeiture, or a combination thereof. Further, if substantial and material questions of fact exist such as evidence of discrimination or if grant of the application would not be consistent with the public interest, the Commission designates the application for hearing. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO);* 47 U.S.C. Sec. 309(d)(2); *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont).*

8. Reviewing each licensee's efforts in light of the NAACP/NBMC's arguments, we conclude with respect to KTAB-TV that no *prima facie* case hase been made, and, with respect to the other stations, that no substantial and material questions of fact remain, with respect to the challenged licensees and that favorable action on their applications will serve the public interest. In particular, we conclude that there are no substantial and material questions of fact suggesting that the licensees discriminated and therefore no reason to designate for hearing. In addition, the licensees of Stations KTAB-TV and KAMR-TV generally had adequate records of EEO efforts. Thus, we will grant their applications without sanction or rem-

edy. However, we believe that the EEO programs of the licensee of KVII-TV was not adequately implemented so as to fully comply with the Commission's EEO rule during the 1984-1988 license term. It appears that the stations relied heavily on the processing guidelines in an attempt to comply with our rule and did not pursue an aggressive recruitment program. The station was either close to, or above, the processing guidelines for much of the license term and there thus was no substantial statistical disparity. *See* n. 6, *supra*. However, we focus on a licensee's efforts. An analysis of each licensee's EEO efforts and compliance follows.

KTAB-TV, ABILINE, TEXAS

9. Review of the station's EEO program indicates that during the reporting year, *i.e.*, the 12-month period prior to the submission of the renewal application, the licensee contacted and received referrals from the Texas Employment Commission, Kelley Services, local high schools and universities, and the Minority Job Bank. Toward the end of the license term, contacts were expanded to include local community leaders of LULAC (League of United Latin American Citizens) and the Hispanic and Black Chambers of Commerce. Also, during the licensee's tenure, on-the-job training resulted in the promotion of a part-time Black female production worker to a full-time position and the promotion of two white females. An Hispanic male recruited from a local school also received on-the-job training. Additionally, the station indicates that it is now part of a formal EEO assessment program instituted by its parent corporation, Shamrock, which includes guidance and instruction to station managers regarding implementation of their EEO programs.

10. The available labor force for Abilene includes 16.2% minorities (5.2% Black, 9.9% Hispanic and 1.1% Asian, American Indian or Pacific Islander).[8] A review of the 1987 and 1988 Annual Employment Reports[9] show increasing minority representation over the one minority reported by the former licensee in 1986. In 1987, the station employed two Hispanics (4.0%) on its full-time staff of 50 employees. Both (4.3%) were among the station's 46 upper-level employees. The 1988 Annual Employment Report shows that among 55 full-time staff members were five (9.1%) minorities. Two (3.6%) of them are Black and three (5.5%) are Hispanic. All five are among the 51 upper-level employees. Review of the employment information indicates that the station hired 13 full-time employees between December 30, 1986, and the end of the license term. Of those, three were minorities and six were women. Also, one minority female hired as a part-time employee was promoted to full-time status, making four full-time minority employees. The applicant data accompanying the hiring activity reveals that, of the 60 applicants for the 13 full-time positions, 14 (23.3%) were minorites, of whom nine (15%) were Black and five (8.3%) Hispanic. The data also indicate that minorities were considered for six of the 13 positions.

11. KTAB-TV's record indicates that the petitioners failed to make a *prima facie* case that renewal would not be in the public interest. We note that there is no substantial statistical disparity between the station's employment profile and minority presence in the workforce. The EEO program appears effective and there is no evidence of intentional discrimination. Although the licensee held the station for a relatively short period, it made efforts to attract qualified minority applicants. Those efforts resulted in minority hires. We therefore find this case is similar to *Carolina Christian Broadcasting, Inc.*, 3 FCC Rcd 1907 (1988), (WKFT(TV)), where we also granted unconditional renewal. Accordingly, we find that no administrative action or further inquiry is warranted.

KAMR-TV, AMARILLO TEXAS

12. Review of the supplemental information and the EEO program reveal that between August 1, 1986, and the end of the license term, the licensee did not contact minority organizations for recruitment purposes. Six (23%) minorities were among the station's 26 full-time hires.[10] One of the six was Hispanic, hired in February 1988, near the end of the license term. Of 21 upper-level hires, two were minorities. The remaining minority hires were to five lower-level clerical positions. The sources for these minority hires included Amarillo College (1 referral), current employees (2 referrals), one rehired former employee, and one unsolicited applicant. Minority applicants were considered for 11 of the 26 positions. Most of the minority referrals were received from the Texas Employment Commission, broadcast stations, and employment agencies. Minorities comprised five of the six unsolicited applications the station received during this period. Three of the 24 promotions given during this period were minorities (one American Indian, one Hispanic and one Black). The licensee also provided supplemental training outside of the station such as sending engineers to an equipment maintenance school.

13. The Amarillo labor force includes 13.5% minorities, (4.5% Black, 7.6% Hispanic, and 1.4% Asian, American Indian or Pacific Islander). A review of the Annual Employment Reports show that employment of Blacks decreased from two in 1984 to zero in 1986 and then increased to three at renewal time. Employment of Hispanics increased from none in 1984 to four in 1986 (three of whom were upper-level) before declining to two at renewal time. The 1988 Annual Employment Report shows 57 full-time employees, five (8.8%) of whom were minorities, including three (5.3%) Blacks and two (3.5%) Hispanics, and 52 upper-level employees, four (7.7%) of whom were minorities, including two (3.8%) Blacks and two (3.8%) Hispanics. The applicant data reveals that, of the 100 applicants for the 26 full-time positions, 32 (32%) were minorities, of whom 19 (19%) were Black and 13 (13%) were Hispanic.

14. With regard to recruitment, NBMC/NAACP contend that the station's minority employment record was deficient in that the licensee did not contact woman's organizations, or maintain contact with minorities through advertisements in newspapers as promised in the 1983 EEO program, or propose such contacts for the future. The licensee maintains that it never promised to contact female and minority sources in its 1983 EEO program because contacts in the prior license term were unproductive. The licensee argues that it nevertheless assessed and modified its EEO policy as specified by the Commission's EEO rule by cultivating female and minority referrals from general sources such as local schools and colleges where station employees have developed contacts as well as through employee referrals, and placing newspaper and prime time television ads stating that the station is an equal opportunity employer.[11] The licensee attributes the static minority employment to the lure of larger markets.[12] NAACP/NBMC point out that the licensee does not show that the losses to larger markets

applied more to minority than nonminority employees or that the station itself did not receive referrals from other markets. They also note that the licensee provides no documentation to show it initially found minority and female sources unproductive.

15. Review of the record indicates that no substantial or material question of fact exists warranting additional inquiry. We note that there is no evidence of discrimination and based upon the licensee's overall efforts as detailed in paragraphs 12, 13, and 14 *supra*, we believe that the licensee generally complied with our EEO rule and is entitled to an unconditional renewal grant with no reporting conditions. However, we caution the licensee that, it is obligated to engage in continued self-assessmsent to determine the degree to which it has been successful in recruiting minority applicants and what additional efforts, for example, additional contact with minority referral sources, should be listed to ensure that all applicant pools include minorities.

KVII-TV, AMARILLO, TEXAS

16. Review of supplemental information and the EEO program reveal that while the station states that it contacted the NAACP nine times in 1988, no information as to any prior contacts was given and the local chapter of the NAACP was the only minority source contacted between August 1, 1986 and the end of the license term, during which time 17 full-time positions were filled. The applicant data show no more than five minorities out of the 76 applicants considered for the 17 positions. Two Hispanics and no Blacks were among the 17 persons hired. Minority applicants were in the pools for only four of the 17 positions. Most of the 76 applicants were referrals received from local colleges, a broadcast trade association and stations in other markets.[13] The balance of the candidates were unsolicited applicants. With respect to promotions, the station promoted an Hispanic male as a result of on-the-job training. Based on its review of its EEO program, the licensee believes a sufficient number of qualfied women and minorities are applying for available positions.

17. The Amarillo MSA labor force includes a total of 13.5% minorities (4.5% Black, 7.6% Hispanic and 1.4% Asian, American Indian, or Pacific Islander). Review of the Annual Employment Reports show fairly uniform minority representation from 1984 through 1988, with Black employment declining by one and Hispanic employment increasing by two. In 1984, a staff of 51 full-time employees included three (5.9%) minorities, including two (3.9%) Blacks and one (1.9%) Hispanic, all of whom were among the 47 upper-level employees. By 1988, a full-time staff of 55 included four (7.2%) minorities, including one (1.8%) Black and three (5.5%) Hispanics, all of whom were among 51 upper-level employees.

18. NAACP/NBMC contend that no referrals resulted from the station's contacts with the NAACP which were "sporadic at best." They also contend that no other minority organizations, media, or schools were contacted during the license term and the 1988 EEO program is essentially the same as that proposed in 1983, "which clearly did not succeed in any meaningful way in improving minority representation on the station's staff." The licensee contends that it acted in good faith and its EEO program has been effective since it resulted in the hiring, training and promotion of minorities. The licensee asserts that because no referrals resulted from the NAACP in the license term ending in 1983 or from contacts in 1988, the station relied upon more productive sources, such as local schools. The licensee attributes minority attrition to the lure of jobs in larger better paying markets, but acknowledges the need for more intensive minority recruitment. It, therefore, concludes renewal of license without conditions is warranted. NAACP/NBMC argues that the station's vow to expand minority recruitment is a last-minute initiative which must be disregarded in evaluating license term performance.

19. Based upon the evidence presented, we find that no substantial and material question exists warranting additional inquiry. We find no evidence of discrimination and the licensee generally complied with our EEO rule. However, the station's efforts raise several concerns. First, the station did not affirmatively recruit minorities whenever vacancies occured. The sources contacted in lieu of the NAACP do not appear to have produced minority referrals. Secondly, the licensee's analysis of its EEO efforts was deficient because its program indicated that a sufficient number of minorities were applying for positions when the data show otherwise. Lastly, the station did not adequately assess its employment profile and EEO efforts in light of a decline in Black employment. Only after the filing of the petition did the licensee engage in self-assessment and conclude that the decline resulted from the lure of larger markets. However, this type of attrition involves all employees and the station itself received referrals from other markets.

20. In determining the appropriate sanction or remedy, we have carefully considered the facts and circumstances of this case in light of the pertinent case precedent in this area. The present case is similar to those in which stations received only reporting conditions, such as *Applications of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988) (WXEL/WNFT). We imposed reporting conditions because the stations failed to make adequate EEO efforts and assess those efforts. In those cases, as in the present case, we noted that the stations stopped contacting minority referral sources without an adequate explanation or showing of prior nonproductivity. Accordingly, in order to assure ourselves that these inadequacies do not continue, we will impose reporting conditions on the license renewal of KVII.

21. Accordingly, IT IS ORDERED, That the "Petition to Deny" filed by the Amarillo Branch of the NAACP, the Abilene - Taylor County Branch of the NAACP, the Victoria County Branch of the NAACP and the National Black Media Coalition IS DENIED, and when considered as an informal objection IS DENIED.

22. IT IS FURTHER ORDERED, That the renewal applications for stations KTAB-TV and KAMR-TV ARE GRANTED.

23. IT IS FURTHER ORDERED, That the license renewal application for station KVII-TV IS GRANTED, subject to the reporting conditions specified herein.

24. IT IS FURTHER ORDERED, That the licensee of station KVII-TV file an original and one copy of the following information on April 1, 1990, April 1, 1991 and April 1, 1992.

(a) For the April 1, 1990 report, a list of all job vacancies filled during the twelve months preceding March 1, 1990 and for the April 1, 1991 and April

1, 1992 report, a list covering the period twelve months preceding March 1, 1991 and March 1, 1992, respectively, indicating the job title and full or part-time status of the position, the race or national origin, sex and referral source of each applicant for each job and the race or national origin and sex of the person hired, FCC Form 395 classification of the position, the minimum job qualifications for each vacancy, and the qualifications of the job candidates;[14]

(b) a list of employees as of March 1, 1990, March 1, 1991 and March 1, 1992 by job title indicating part-time or full-time status (ranked from the highest paid to the lowest paid), FCC Form 395 classification, date of hire, sex and race or national origin; and

(c) details concerning the station's efforts to recruit for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

25. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail - Return Receipt Requested one copy of this Memorandum Opinion and Order to the noted branches of the NAACP, National Black Media Coalition and to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The National Black Media Coalition (NBMC), headquartered in Washington, D.C., is a national association of black organizations and persons seeking additional black employment, program service and ownership in the media.

[2] The challenged license renewal applications are: KTAB-TV (File No. BRCT-880401KU), licensed to Big Country TV Co. of Abiline; KAMR-TV (File No. BRCT-880401KW), licensed to Cannan Communications, Inc. and KVII-TV (File No. BRCT-880329KK) licensed to Marsh Media, Inc., both serving Amarillo. The petition also sought denial of the license renewals for stations KVCT(TV) and KAVU(TV), both serving Victoria, Texas. NAACP/NBMC withdrew their petition against KAVU and the Commission's staff, pursuant to delegated authority, renewed the license of KAVU following a thorough review of its EEO efforts. Although NAACP/NBMC withdrew their petition against KVCT, we have determined that renewal subject to reporting conditions is warranted. *See Victoria Communications Corp., (MMB),* (August , 1989).

[3] Also before us are inquiries written pursuant to *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) *(Bilingual)* to the licensees dated December 27, 1988, the licensees' responses, and NAACP/NBMC's comments. The letters of inquiry requested a list of all job vacancies filled by the stations during the two year period prior to the filing of the renewal application (or in the case of KTAB, during the period the licensee has held the station) indicating the sex, race and referral source of each applicant for the job and the successful job candidate, as well as specific questions regarding concerns unique to each station.

[4] NAACP submitted the statements of Reverend Andrew L. Penns, President of the Abilene-Taylor County Branch of the NAACP and viewer of KTAB-TV and Nat Cantly, President of the Amarillo Branch of the NAACP, and viewer of KAMR-TV and KVII-TV.

[5] We initially review a licensee's efforts toward all minorities in the available labor force. *See Bilingual, supra*, at 625 n. 7. However, where there is more than one minority group in the labor force, as in Abilene and Amarillo, with significant representation (Blacks and Hispanics), we review the licensee's efforts toward each. Where, as in Victoria, one minority group is predominantly represented in the labor force (Hispanics), we focus on the licensee's efforts toward it. However, the nondominant minority (in this case, Blacks) is not neglected in our review. Lastly, we note that NAACP/NBMC challenged KAMR's employment practices with respect to women. We have examined each station's efforts toward women and found them adequate.

[6] In *Bilingual, supra*, the court stated that a substantial statistical disparity between the available minority workforce and a station's minority employment, coupled with a languishing affirmative action plan, raises questions as to whether the station's poor EEO performance is due to inadvertence or to intentional discrimination.

[7] Section 309 (d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 309 (d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

[8] Texas labor force data for all of the stations was obtained from the EEOC's Office of Program Research "1980 Census Data Report."

[9] The licensee acquired the station on December 30, 1986.

[10] In August 1987 and April 1988 the licensee claims to have made offers for photographer's positions to two Black and two Hispanic employees of regional stations, which were declined.

[11] The licensee's response to the staff's inquiry indicates that the television advertisements were aired over 1,000 times during the license term. These ads did not, however, notify the public of specific job openings.

[12] The licensee states that in 1988, a Black male employed as chief photographer resigned to join a television station in Houston (the 10th largest market in the U.S.) at approximately twice the salary. In 1985, the station also lost two Hispanic employees to larger markets.

[13] While the EEO program indicates that the Texas Employment Commission provided 13 referrals and local colleges and universities 62 referrals during the EEO program reporting year, the licensee acknowledges in supplemental information that it cannot document these statements. The licensee also admitted some applicant data is incomplete, or in the case of the news department, totally destroyed due to an administrative change in that department. Also, some applicant data were not sufficiently detailed to indicate race and sex or to identify the referral sources of some minority applicants.

[14] Such a list might start: (1) D.J., part-time, white female, A.W.R.T.; white male, newspaper; black male, Urban League - selected white female.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCCAW SPACE TECHNOLOGIES, INC. File No. CSS-86-003-LA

Request for One-Year Extension of Time to Demonstrate Permanent Financial Qualifications to Construct and Operate an International Satellite Communications System.

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 1989; Released: September 5, 1989

By the Chief, Common Carrier Bureau:

1. On March 17, 1989, McCaw Space Technologies, Inc. (McCaw) filed a request for a one-year extension of the time limit set for meeting the Commission's Separate System financial requirements. McCaw holds a conditional authorization to provide a variety of international video and data services via its Celestar system.[1]

2. This is the second time McCaw has asked the Commission for an extension of the deadline for meeting the second-stage of the Separate Systems financial requirements.[2] In the instant request, McCaw states that despite diligent efforts, it was unable during the previous extension period to obtain an operating agreement with a foreign correspondent. It explains that it has continued efforts in those countries where initial contacts proved promising and has initiated efforts in other countries in the regions of potential coverage. According to McCaw, these contacts have included representatives of foreign telecommunications ministries and commercial organizations, potential foreign customers, international funding and development agencies and foreign satellite system designers and providers. It claims that over the past year, it has spent additional time and resources pursuing operating agreements, discussing launch arrangements with launch vehicle operators and examining prospective markets. McCaw attributes part of its difficulty in securing the necessary agreements to the uncertainty that, until recently, had surrounded the international status of the proposed downlink frequency assignment for its Celestar II satellite.

DISCUSSION

3. In 1985, the Commission determined that the public interest would be served by grant, under certain terms and conditions, of authorizations for international satellite systems separate from INTELSAT.[3] Recognizing the unique institutional and commercial obstacles to be faced by separate system applicants, the Commission adopted a two-part financial qualifications test. At the application stage, applicants are required to provide an estimate of start-up costs, costs of construction, launch and operation of their systems for a period of one year and potential or actual source of funding.[4] The Commission stated that it would grant a conditional construction permit upon such a showing, allowing the applicant to defer until later a demonstration that funds were available to operate the proposed system. Specifically, the applicants must demonstrate sufficient non-contingent funds to meet the costs of construction and launch and operating expenses for one year after launch. The Commission required the applicants to file this demonstration no later than 60 days after the date on which the Commission received notification from the Department of State, with regard to a particular separate systems applicant, that the United States had fulfilled its obligations under Article XIV(d) of the INTELSAT Agreement.[5]

4. Upon reconsideration of the Separate Systems decision, the Commission affirmed the two-part financial qualifications test, but imposed on all conditional authorizations a one-year limitation for the second-stage financial showing.[6] The Commission noted, however, that applicants might extend their authorizations beyond the one-year limit through a good faith showing of diligence in seeking to establish their proposed systems.[7]

5. We recognize the unique circumstances applicants must face in implementing separate international satellite systems. As part of the first U.S. initiative in the area of separate international satellite systems, applicants may experience difficulties in securing agreements with a foreign correspondent for use of the system. Once this has been accomplished, the applicant must complete the INTELSAT Article XIV(d) consultation process, so that INTELSAT can determine whether the separate system will cause either technical or significant economic harm to the global system. We find that McCaw has demonstrated that it is making all reasonable efforts to establish its system. The obstacles McCaw has encountered in securing its downlink frequencies have added to the difficulties separate systems operators normally face in obtaining operating agreements. Consequently, we find that good cause exists to grant McCaw a one-year extension of its conditional authorization for the demonstration of permanent financial qualifications.

6. Accordingly, IT IS ORDERED that the request of McCaw for a one-year extension of time to demonstrate permanent financial qualifications IS GRANTED and McCaw must file within one year from the release date of this order all necessary information to meet the Commission's full financial requirements for the operation of its international satellite system.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The Celestar system will consist of two in-orbit 11-12/14 GHz satellites located at 170^0 east longitude and 70^0 west longitude. McCaw plans to serve the U.S., Canada, New Zealand, Australia, Japan, the Peoples' Republic of China, India, the Philippines, Taiwan, Indonesia, Hong Kong, Malaysia, Guam, southern Africa, the Middle East and some European countries. *See* McCaw Space Technologies, 2 FCC Rcd 259 (1987).

[2] *See* McCaw Space Technologies, Inc., 3 FCC Rcd 1625 (1988).

[3] Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985).

[4] *Id.* at 1165.

[5] *Id.* at 1165-1166.

[6] Establishment of Satellite Systems Providing International Communications (Separate Systems Reconsideration), FCC 86-144 (released Apr. 17, 1986).

[7] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELCO, INC.,
Complainant,

v. File No. E-89-144

SOUTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: August 28, 1989; Released: September 6, 1989

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On April 19, 1989, American Telco, Inc., filed a formal complaint regarding the defendant's provision of facilities and services for access to the interstate networks for the origination and termination of long distance telephone calls. The complainant alleged that American Telco had been subject to charges by the defendant that were discriminatory, unjust, and unreasonable in violation of Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a). It also alleged that the defendant had failed to file its shared network facilities agreements (SNFAs) with the Commission in violation of Section 211 of the Communications Act, 47 U.S.C. § 211. The complainant further requested an award of damages.

2. On August 8, 1989, the complainant filed a motion requesting dismissal without prejudice of the above-captioned complaint. Because there is no longer a controversy between the parties, we find that it is in the public interest to grant the motion.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Motion to Dismiss filed by American Telco, Inc., IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166,
Phase I

In the Matter of

Investigation of Special Access Tariffs
of Local Exchange Carriers

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1989; Released: August 31, 1989

By the Commission:

I. INTRODUCTION

1. On November 9, 1987, the Common Carrier Bureau (Bureau) released an Order[1] requiring local exchange carriers (LECs) to refund by January 8, 1988, excessive television service charges associated with polyethylene shielded video (PSV) cable investment paid by their customers. The *Refund Order* was the subject of petitions for clarification and reconsideration or partial reconsideration, and on May 26, 1988, the Bureau released its *Reconsideration Order* resolving those issues.[2] The *Refund Order* is also the subject of an application for review filed by the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West) on behalf of Pacific Northwest Bell Telephone Company (but not the other US West companies). Capital Cities/ABC, Inc., CBS Inc., and National Broadcasting Company, Inc. (the Networks) filed an opposition.

2. US West argues that Pacific Northwest Bell Telephone Company (PNB) should be excused from any refund obligation because the rates in question were established pursuant to a prescription imposed by this Commission. US West argues further that the *Refund Order* is inconsistent with CC Docket No. 84-800 refund procedures.[3] The Networks' opposition declines to comment on the first of these arguments, as the Networks make no refund claim against PNB.[4] The Networks state that the second argument is moot, as this Commission has already addressed how carriers should treat the relationship between their refund obligations in this proceeding and their potential refund obligations under the procedures of CC Docket No. 84-800.[5]

3. In view of the absence of any refund claims against PNB, we find that the entire question is moot, and accordingly dismiss the application for review.

4. Accordingly, IT IS ORDERED that the application for review filed by the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company in the above-captioned proceeding IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, Memorandum Opinion and Order, 2 FCC Rcd 6847 (Com.Car.Bur. 1987) (*Refund Order*).

[2] Investigation of Special Access Tariffs of Local Exchange Carriers, Memorandum Opinion and Order, 3 FCC Rcd 3547 (Com.Car.Bur. 1988) (*Reconsideration Order*). Petitions were filed by the Ameritech Operating Companies (Ameritech), Hughes Television Network (Hughes), the Association of Independent Television Stations, Inc. (INTV), the National Association of Broadcasters (NAB), and New York Telephone Company (NYT).

[3] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, Memorandum Opinion and Order, FCC 85-827, released Sept. 30, 1985; Memorandum Opinion and Order, FCC 86-114, released Mar. 24, 1986; CC Docket No. 84-800, Phase II, Memorandum Opinion and Order, FCC 85-645, released Dec. 20, 1985; Memorandum Opinion and Order on Reconsideration, FCC 86-353, 104 FCC 2d 1404 (1986); *reversed sub nom.* AT&T v. FCC, No. 85-1778, slip op., (D.C. Cir. 1988).

[4] PNB was included among the carriers discussed in the proceedings leading to the *Refund Order*, and was included in the terms of that Order as obliged to refund overcharges due to excessive PSV cable investment. Several television user parties filed refund claims, but none claimed any refund due from PNB.

[5] The Networks refer to Southwestern Bell Telephone Company, Memorandum Opinion and Order, 2 FCC Rcd 7236 (Com.Car.Bur. 1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-532

In the Matter of

Amendment of Section 73.202(b), RM-6415
Table of Allotments,
FM Broadcast Stations.
(Yazoo City, Mississippi and
Rayville, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 14, 1989; Released: September 6, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 6847 (1988), proposing the substitution of FM Channel 221C2 for Channel 222A at Yazoo City, Mississippi. The *Notice* was issued in response to a petition filed by St. Pe' Broadcasting, Inc. (petitioner). Petitioner also requested modification of its license for Station WJNS(FM) to specify operation on the higher class channel. Petitioner filed comments restating its interest in the allotment of Channel 221C2. Ken Diebel (Diebel) filed comments and a counterproposal.[1]

2. As stated in the *Notice* Channel 221C2 can be allotted to Yazoo City in compliance with the Commission's spacing requirements provided Channel 221A at Rayville, Louisiana, is deleted. Channel 221A is licensed to Delta Communications, Ltd. Petitioner proposed the substitution of Channel 222A for Channel 221A at Rayville, which can be accomplished in compliance with minimum distance separation requirements at the current site of Station KTJC(FM). An Order to Show Cause was issued to Delta Communications.

3. After careful consideration of the proposal, we conclude that the public interest would be served by the channel substitution at Yazoo City, Mississippi, as a first wide coverage area FM service. In order to accomplish the substitution at Yazoo City, Channel 222A must be substituted for Channel 221A at Rayville, Louisiana. Both substitutions can be made in compliance with the Commission's minimum spacing requirements.[2] In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WJNS(FM) at Yazoo City, to specify operation on Channel 221C2.

4. Commission policy requires that Station KTJC(FM) be reimbursed for the reasonable cost of changing frequencies from one Class A channel to another. St. Pe' Broadcasting, Inc. has agreed to reimburse Station KTJC(FM) for changing frequency.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 20, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Rayville, Louisiana	222A
Yazoo City, Mississippi	221C2, 229A

6. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WJNS(FM), Yazoo City, Mississippi, IS MODIFIED TO SPECIFY operation on Channel 221C2 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KTJC(FM), Rayville, Louisiana, IS MODIFIED, to specify operation on Channel 222A, subject to the following conditions.

(a) Nothing contained herein shall be construed as authorizing any change in license BLH840910BY except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests maybe conducted in accordance with the provisions of Section 73.1620 of the Rules, provided the transmission facilities comply in all respects with license BLH840910BY except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of the commencement of program tests.

8. IT IS FURTHER ORDERED, that the Secretary of the Commission Shall Send, by Certified Mail, Return Receipt Requested, a copy of this Report and Order, to the licensee of Station KTJC(FM), as follows:

Delta Communications Ltd.
Station KTJC(FM)
12071/2 Louisa Street
Rayville, Louisiana 71269

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Although timely filed, the counterproposal did not contain a certificate of service indicating a copy was served on the petitioner. Therefore, the counterproposal has not been accepted. However, due to the interest expressed by Delta Communications, Ltd. for a C2 facility in Rayville, we shall issue a separate Notice of Proposed Rule Making, requesting comments on the upgrade (RM-6735).

[2] The coordinates for Channel 222A at Rayville are 32-27-22 and 91-39-27. The coordinates for Channel 221C2 at Yazoo City are 33-03-57 and 90-35-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-609

In the Matter of

Amendment of Section 73.202(b),	RM-6498
Table of Allotments,	
FM Broadcast Stations.	
(Galeton, Pennsylvania)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 22, 1989; Released: September 6, 1989

By the Chief, Allocations Branch:

1. At the request of Lori L. Michael (petitioner), the Commission has before it the *Notice of Proposed Rule Making* ("*Notice*"), 4 FCC Rcd 1232 (1989), proposing the allotment of Channel 264B1 to Galeton, Pennsylvania, as the community's first local FM service. Petitioner filed supporting comments. No other comments were received.

2. Petitioner states that she has no objection to the allotment of Channel 264B1 but would prefer the allotment of Channel 268B1, as originally requested in her petition for rule making, since it requires no site restriction. However, as stated in the *Notice*, use of Channel 268B1 at Galeton would conflict with Channel 268A at Covington, Pennsylvania.[1]

3. We believe the public interest would be served by allotting Channel 264B1 to Galeton, Pennsylvania, since it could provide the community with its first local FM service. Channel 264B1 can be allotted to Galeton in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.4 kilometers (9.6 miles) southeast to avoid a short-spacing to Stations WQIX, Channel 265A, Horseheads, New York, and WBJZ, Channel 265A, Olean, New York.[2] Canadian concurrence has been received since Galeton is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 20, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Galeton, Pennsylvania	264B1

5. The window period for filing applications will open on **October 23, 1989,** and close on **November 22, 1989.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Channel 268A was allotted to Covington by *Report and Order* in MM Docket 88-258, released July 26, 1989, Mimeo No. 89824.

[2] The coordinates for this allotment are North Latitude 41-36-26 and West Longitude 77-33-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-384

In the Matter of

Amendment of Section 73.202(b),	RM-6884
Table of Allotments,	
FM Broadcast Stations.	
(Epworth, Iowa)	

NOTICE OF PROPOSED RULE MAKING

Adopted: August 22, 1989; Released: September 6, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Margaret Keefer (petitioner) requesting the allotment of Channel 247C3 to Epworth, Iowa, as the community's first local FM service. Petitioner states that she will apply for the channel, if allotted. Channel 247C3 can be allotted to Epworth in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 247C3 to Epworth, Iowa, since an interest has been expressed in providing the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Epworth, Iowa	--	247C3

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **October 27, 1989,** and reply comments on or before **November 13, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Margaret Keefer	Larry G. Fuss
811 Duke	P.O. Box 159
Rice Lake, Wisconsin 54868	Fayetteville, Georgia 30214
(Petitioner)	(Consultant to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 42-26-42 and West Longitude 90-55-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-413

In the Matter of

Amendment of Section 73.202(b), RM-5630
Table of Allotments,
FM Broadcast Stations.
(Ligonier, Indiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 22, 1989; Released: September 6, 1989

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 6096 (1987), issued in response to a petition filed on behalf of Erwin Draper (petitioner) proposing the allotment of Channel 274A to Ligonier, Indiana, as that community's first local FM broadcast service. Petitioner filed supporting comments reiterating his intention to apply for the channel, if allotted. Huntington Broadcasting Corporation ("HBC"), licensee of Station WIOE(FM), Huntington, Indiana, Channel 276A,[1] also filed comments.[2]

2. We believe the public interest would be served by allotting Channel 274A to Ligonier, Indiana, since it could provide a first local FM broadcast service to that community.

3. Channel 274A can be allotted to Ligonier consistent with the minimum distance separation requirements specified in Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 1.8 kilometers (1.1 miles) north[3] of the community to avoid short-spacing to Channel 275A, Huntington, Indiana.[4] Additionally, since the proposed allotment is within 320 kilometers (199 miles) of the Canadian border, concurrence of that government was obtained.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 20, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Ligonier, Indiana	274A

5. The window period for filing applications on Channel 274A at Ligonier, Indiana, will open on **October 23, 1989,** and close on **November 22, 1989.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Station WIOE(FM) has been ordered to modify its facilities to specify operation on Channel 275A, pursuant to MM Docket No. 86-359, 2 FCC Rcd 6505 (1987).

[2] HBC's comments state that while it has no objection to the proposed allotment of Channel 274A to Ligonier, it does object to the manner in which the Commission treated the proposal in formulating its allotment plans for Churubusco, Roanoke, South Whitley and Huntington, Indiana, in MM Docket No. 86-359. Specifically, HBC believes that the Commission improperly considered the proposal for Ligonier when acting on the Churubusco rule making proposal. Accordingly, HBC seeks to incorporate by reference the procedural arguments set forth in its petition for reconsideration in the latter proceeding. However, we note that its reconsideration request has been separately considered and denied in MM Docket No. 86-359. *See Memorandum Opinion and Order*, 4 FCC Rcd 5045 (1989). HBC's procedural arguments will be reviewed, if warranted, in conjunction with its application for review of the *Memorandum Opinion and Order* in MM Docket No. 86-359.

[3] Coordinates at the restricted site for Channel 274A are 41-28-51 and 85-35-34.

[4] Coordinates used for Channel 275A at Huntington are 40-55-33 and 85-23-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-76

In the Matter of

Amendment of Section 73.606(b), RM-6633
Table of Allotments,
TV Broadcast Stations.
(Thief River Falls, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 21, 1989; Released: September 6, 1989

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 2686 (1989), issued in response to a petition filed by Thief River Falls Technical Institute (petitioner), proposing the allotment of UHF Television Channel *30 to Thief River Falls, Minnesota. Petitioner filed comments in which it reaffirmed its interest in the channel. No other comments were received.

2. Thief River Falls (population 9,105),[1] seat of Pennington County (population 15,258), is located in northwestern Minnesota, approximately 420 kilometers (260 miles) northwest of Minneapolis.

3. As indicated in the Notice, UHF Television Channel *30 can be allotted to Thief River Falls, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules.[2] Since Thief River Falls is located within 200 miles of the U.S.-Canadian border, Canadian concurrence has been obtained.

4. In view of the foregoing, we believe that the public interest would be served by allotting UHF Television Channel *30 to Thief River Falls, Minnesota, reserving the channel for noncommercial educational use. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 20, 1989,** the Television Table of Allotments, Section 73.606(b) of the Rules, IS AMENDED with respect to the following community:

Community	Channel No.
Thief River Falls, Minnesota	10, *30

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Population figures are from the 1980 U.S. Census.

[2] The coordinates for Channel *30 are 48-07-06 and 96-10-24. This allotment is not affected by the Commission's temporary freeze on the filing of allotment requests and construction permit applications in the vicinity of certain metropolitan areas. *See* Order, 52 FR 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-385

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Glen Arbor and Scottsville, Michigan) — RM-6892

NOTICE OF PROPOSED RULE MAKING

Adopted: August 21, 1989; Released: September 6, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed jointly by David C. Schaberg (Schaberg) and West Shore Broadcasting (West Shore), requesting the substititution of FM Channel 240C2 for Channel 240A at Glen Arbor, Michigan, and substitution of Channel 235C3 for Channel 240A at Scottsville, Michigan. Schaberg requests modification of his construction permit for Channel 240A, Glen Arbor, to specify operation on Channel 240C2. West Shore requests modification of its license for Station WKZC, Channel 240A, to specify Channel 235C3.

2. Channel 240C2 can be allotted to Glen Arbor, Michigan, at petitioner's specified site, in compliance with the Commission's spacing requirements, provided Channel 240A is deleted at Scottsville, Michigan.[1] As requested, we shall propose to modify the construction permit for Channel 240A at Glen Arbor (BPH-850906MH), to specify Channel 240C2 in accordance with Section 1.420(g) of the Commission's Ruels. West Shore, licensee of Station WKZC, Scottsville, has proposed the substitution of Channel 235C3 for Channel 240A. The substitution at Scottsville can be accomplished in compliance with the Commission's spacing requirements, at petitioner's proposed site.[2] We shall propose to modify the license of Station WKZC, as requested, to specify operation on Channel 235C3. However, should another party indicate an interest in the Class C3 allotment, the modification cannot be implemented unless an additional equivalent channel is also allotted. *See Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984). Canadian concurrence is required since Glen Arbor and Scottsville are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. In order to provide a wide coverage area station for the Glen Arbor and Scottsville areas, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

City	Channel No. Present	Proposed
Glen Arbor, Michigan	240A, 251A	240C2, 251A
Scottsville, Michigan	240A	235C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 27, 1989,** and reply comments on or before **November 13, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David C. Schaberg
P.O. Box 21055
Lansing, Michigan 48909-1055

Katheryn Ziehm
West Shore Broadcasting
P.O. Box 36
Scottsville, Michigan 49454

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 240C2 are 44-51-00 and 85-45-00.

[2] The coordinates for Channel 235C3 are 44-04-40 and 86-25-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-92

In the Matter of

Amendment of Section 73.202(b), RM-6660
Table of Allotments,
FM Broadcast Stations.
(Bishopville, Maryland)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 21, 1989; Released: September 6, 1989

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 3797 (1989), proposing the allotment of FM Channel 295A to Bishopville, Maryland, as that community's first FM broadcast service. The *Notice* was issued in response to a petition filed by John P. Gillen (petitioner). Petitioner filed comments withdrawing his interest in the channel. Billy Gene Crisp and SR Communications filed comments supporting the allotment.

2. The *Notice* proposed the allotment of Channel 295A to Bishopville, Maryland, with a site restriction 4.1 kilometers southwest. The petitioner was requested to present the Commission with sufficient information to demonstrate that Bishopville had the social, economic or cultural indicia to qualify it as a community for allotment purposes. The *Notice* indicated in footnote 2 that Bishopville was listed in the Rand McNally Commercial Atlas as having a population of 215, with a post office and a zip code.

3. In comments withdrawing his interest in the proceeding, petitioner states that Bishopville is not listed in the 1980 census and the population of 2,700 used in his petition was based on information provided by the Bishopville Post Office as an estimate of the number of persons served by its zip code. Petitioner further states that he cannot show the Commission sufficient information to demonstrate that Bishopville is a community for allotment purposes and does not wish to pursue the use of Channel 295A in Bishopville.

4. SR Communications expressed an interest in the channel at Bishopville but failed to provide any information qualifying Bishopville as a community for allotment purposes. Although we accepted the petition for rule making filed by Billy Gene Crisp as comments of interest, he also failed to provide information demonstrating that Bishopville meets the Commission's definition of a community for allotment purposes. Therefore, since the petitioner has withdrawn his interest and the two parties filing comments have failed to provide the requested information to qualify Bishopville as a community, we dismiss the proposal for Bishopville.

5. Accordingly, IT IS ORDERED, That the petition of John P. Gillen requesting the allotment of Channel 295A to Bishopville, Maryland, IS HEREBY DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-386

In the Matter of

Amendment of Section 73.202(b),	RM-6880
Table of Allotments,	
FM Broadcast Stations.	
(Orangeburg, South Carolina)	

NOTICE OF PROPOSED RULE MAKING

Adopted: August 21, 1989; Released: September 6, 1989

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Wilkes-Posey Broadcasting Inc. (petitioner), requesting the substitution of Channel 280C3 for Channel 280A at Orangeburg, South Carolina, and the modification of its license for Station WKSO to specify the higher powered facility. Petitioner failed to state its intention to apply for the channel, if allotted. Therefore, it is requested to do so in comments.

2. Channel 280C3 can be allotted to Orangeburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.1 kilometers (6.3 miles) north to avoid a short-spacing to Station WGEC, Channel 280A, Springfield, Georgia, and to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's license for Station WKSO to specify operation on Channel 280C3. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of the higher powered channel at Orangeburg or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 280C3 for Channel 280A at Orangeburg, South Carolina, since it could enable Station WKSO to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Orangeburg, South Carolina	275A, 280A, 294C1	275A, 280C3, 294C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 27, 1989,** and reply comments on or before **November 13, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Wilkes-Posey Broadcasting, Inc.
P.O. Box 430
Orangeburg, South Carolina 29115
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments. Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 33-35-00 and West Longitude 80-50-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA,
Complainant,

v. File No. E-89-146

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: August 28, 1989; Released: September 6, 1989

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. The Public Service Commission of the District of Columbia (D.C. PSC) has requested that the Federal Communications Commission (FCC or Commission) postpone all discovery as well as all motions to compel responses to previously-filed interrogatories until fifteen days after the FCC rules on the motion to dismiss the complaint filed by The Chesapeake and Potomac Telephone Company (C&P) in the above-referenced proceeding.[1] For reasons specified below, we will order discovery and motions to compel deferred until October 6, 1989, but otherwise deny D.C. PSC's motion.

2. In support of its motion, D.C. PSC states that it would be wasteful of the time of the parties and of the FCC's staff to permit or require further discovery or motions to compel pre-existing interrogatories and opposition thereto while the basic legal issues at the heart of the complaint have not been determined. D.C. PSC also notes its obligation to file a brief on October 2, 1989, with respect to certain legal issues following a status conference held on August 3, 1989. D.C. PSC states that counsel for C&P has consented to its request.

3. In determining whether or not to grant a stay request, the Commission generally considers the following four factors: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits? (2) Has the petitioner shown that without the requested relief, it will be irreparably injured? (3) Would issuance of a stay substantially harm other parties interested in the proceedings? (4) What action is in the public interest? *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Big Valley Cablevision, Inc.*, 85 FCC 2d 973, 978 (1981); *Comark Cable Fund III*, 104 FCC 2d 451, 456 (1985). D.C. PSC's motion neither addressed these factors nor made the requisite showing for the extraordinary relief that it seeks. In adopting its rules governing the use of discovery in formal complaint proceedings, the Commission stated its belief that discovery should not be held in abeyance pending disposition of procedural matters "since the exchange of information facilitates the framing of facts and issues and ultimate resolution or settlement of the dispute should not be delayed."[2] Furthermore, it is the policy of the Commission that "extensions of time shall not be routinely granted."[3] Moreover, requests for open-ended deferment of filing requirements are generally disfavored particularly in a proceeding, as here, when statutory time constraints appear relevant.[4]

4. In view of the foregoing, D.C. PSC's motion must be denied. However, in light of the special circumstances of this case, particularly extraordinary demands on counsel's time due to the agreed-upon briefing of certain legal issues,[5] and because we believe that focusing on such briefing rather than on discovery at this time should facilitate settlement or ultimate resolution of this dispute, we will authorize a limited deferral of discovery filing requirements.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the "Motion for Postponement of Discovery and Motions to Compel Discovery" filed by the Public Service Commission of the District of Columbia on August 25, 1989, IS DENIED.

6. IT IS FURTHER ORDERED that filing dates for discovery matters ARE DEFERRED until October 6, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Motion for Postponement of Discovery and Motions to Compel Discovery filed August 25, 1989 (motion).

[2] Amendment of Rules Governing Procedures to be Followed Where Formal Complaints Are Filed Against Common Carriers, 3 FCC Rcd 1806, 1811 (1988).

[3] 47 C.F.R. § 1.46(a).

[4] *See* 47 U.S.C. §§ 208(b)(1), 208(b)(3).

[5] *See* letter from Howard M. Wilchins to Peter G. Wolfe (August 4, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

KANSAS CITY TELEVISION, LTD.,
Debtor-in-Possession,

Licensee of Television Station
KZKC(TV), Kansas City, MO

Notice of Apparent Liability
adopted June 23, 1988

ORDER
(Vacating Proceeding)

Adopted: August 4, 1989; Released: September 6, 1989

By the Commission: Commissioner Quello concurring and issuing a statement.

1. On June 23, 1988, the Commission voted to issue a Notice of Apparent Liability for a forfeiture of $2,000 to Kansas City Television, Ltd., Debtor-in-Possession, licensee of KZKC(TV), Channel 62, Kansas City, Missouri, for its 8:00 p.m. broadcast of the movie "Private Lessons," on May 26, 1987. The Commission determined that the broadcast violated the statutory prohibition against the broadcast of indecent material, 18 U.S.C. Section 1464.

2. Before the Notice of Apparent Liability was issued the United States Court of Appeals for the District of Columbia Circuit issued a decision in *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"). While affirming the Commission's adoption of expanded indecency enforcement standards and their application to a daytime broadcast, the court vacated two Commission decisions involving evening broadcasts after 10:00 p.m. because, it concluded, the Commission had inadequately supported its decision that it is necessary to channel indecent broadcasts to post-midnight hours in order to protect children. The court suggested that the Commission conduct a proceeding to establish a safe harbor for the broadcast of indecent programs before taking enforcement action against evening broadcasts. *Id.* at 1342-1343. The court indicated that the Commission should focus not simply on the risk of children being present in the audience but, instead, should direct its efforts to protecting *unsupervised* children. Following the court decision, the Commission stayed the release of the Notice of Apparent Liability against KZKC(TV). *See Order (Staying Proceeding)*, FCC 88-274, released August 5, 1988.

3. Subsequent to the court's decision in *ACT I* but before the Commission had the opportunity to conduct the further proceeding contemplated by the court's decision, Congress passed legislation directing the Commission to adopt a 24-hour prohibition on the broadcast of indecent material, Pub. L. No. 100-459. Pursuant to this statute, on December 19, 1988, the Commission adopted a rule prohibiting the broadcast of indecent material at all times of the day and night. *Enforcement of Prohibitions Against Broadcast of Obscenity and Indecency in 18 U.S.C. § 1464*, 53 Fed. Reg. 52425. The rule would have gone into effect on January 27, 1989, but an appeal was taken and on January 23, 1989, the United States Court of Appeals for the District of Columbia Circuit stayed its implementation pending resolution of the appeal. *Action for Children's Television v. F.C.C.*, Case No. 88-1916, ("*ACT II*"). The court cited its earlier opinion in ACT I as the basis for its decision.

4. As a result of the court's stay of the 24-hour prohibition, ACT I governs our interpretation of Section 1464's prohibition of indecent broadcasts. That decision precludes evening enforcement until the Commission has sufficiently justified an hour after which parents can be expected to supervise their children's viewing and listening habits. While the stay could be lifted by the court when it resolves the pending litigation, thereby effectuating the 24-hour ban, such a ruling would not give the Commission retroactive authority to take enforcement action against evening indecent broadcasts. Accordingly, because we conclude that neither ACT I nor the stayed 24-hour ban permitted imposing a sanction for an evening broadcast in May of 1987, we will vacate the Notice of Apparent Liability previously adopted in this case.

5. We also take this opportunity to reiterate that we take seriously our obligation to enforce 18 U.S.C. § 1464. Nonetheless, we can fulfill this responsibility only to the extent permissible under existing law. Because the court has stayed the Commission's new 24-hour indecency ban, our former enforcement policy remains in effect. That enforcement policy, however, was substantially restricted by the court's decision in ACT I, effectively precluding enforcement against evening broadcasts. Accordingly, until such time as further rulings from the courts permit us to conclude otherwise, we will take enforcement action only against daytime indecent broadcasts. This is the full extent of the Commission's current enforcement authority with respect to indecent broadcasts. Obscene broadcasts continue, of course, to be prohibited at all times of day and night.

6. ACCORDINGLY, IT IS ORDERED, That the above-captioned Notice of Apparent Liability is VACATED and this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

CONCURRING STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

In Re: Kansas City Television, Debtor - In Possession Licensee of Television Station KZKC(TV), Kansas City, MO Notice of Apparent Liability Adopted June 23, 1988

Reluctantly, I must concur with the majority's decision regarding the disposition of the Notice of Apparent Liability issued against KZKC. I agree that our actions here are

governed by the Court's teachings in *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). I supported the decision to stay release of the Notice of Apparent Liability. *See Order*, FCC 88-274, released August 5, 1988.

I continue to believe that the actions of KZKC constitute actionable indecency. My preference would be to move forward with the fine and take the risk in court. It is not clear to me that the Court's decision absolutely precludes *all* evening enforcement of our indecency rules. The Court provided no bright line separating daytime, evening and nighttime viewing. Logic tells me that there is a greater probability that unsupervised children will be viewing television at 8:00 PM than listening to the radio at 10:00 PM or midnight.

Nevertheless, I cannot ignore the legal risks raised by the majority. In its present posture, there is a significant possibility that the case would be reversed in court. Moreover, even if we were to establish new safe harbor provisions, as suggested by the Court, there is a significant problem with retroactive application to the instant case. Given the difficulty the Commission has had with the courts in its attempt to enforce our indecency policy, I believe we must go forward with the strongest possible case. The legal difficulties with this proceeding make it an inappropriate vehicle to serve as the first case enforcing indecency on television.

I remain committed to enforcing our indecency and obscenity policies. Our obligation to enforce these policies is statutory and cannot be ignored. I trust the Commission will conduct a rulemaking expeditiously, in order to determine when there is a reasonable risk that children may be in the audience. Clear unambiguous rules are essential if we are to give parents and broadcasters guidance regarding this important policy.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-535

In re Applications of

Vernon R. Baldwin & Billy W. Lanham d/b/a TRI-STATE COMMUNICATIONS — File No. BPH-870331PD

BROADSTAR COMMUNICATIONS INC., DEBTOR-IN-POSSESSION — File No. BPH-870408KD

For Construction Permit for a New FM Station; Channel 282A, 104.3 MHz
Harrison, Ohio

Appearances

Daniel F. Van Horn, Esquire, and *Jay L. Birnbaum, Esquire*, on behalf of BroadStar Communications, Inc., Debtor-in-Possession; *Lauren A. Colby, Esquire*, on behalf of Vernon R. Baldwin & Billy W. Lanham d/b/a Tri-State Communications; and *James Shook, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: August 25, 1989; Released: September 5, 1989

PRELIMINARY STATEMENT

1. This proceeding was designated for hearing by *Hearing Designation Order*, DA 88-1763, released December 5, 1988. It originally involved nine mutually exclusive applications. As a result of the failure to pay the necessary hearing fee, requests for voluntary dismissal of applications, and a settlement agreement entered into by some of the applicants, this proceeding presently involves the mutually exclusive applications of Vernon R. Baldwin & Billy W. Lanham d/b/a Tri-State Communications (Tri-State) and BroadStar Communications, Inc., Debtor-in-Possession (Broadstar).

2. A prehearing conference in this proceeding was held on February 3, 1989.[1] At such conference, a hearing schedule, providing for a final exchange of all exhibits and sworn written testimony on August 21, 1989, and a hearing on September 11, 1989, was adopted. As a result of a petition to enlarge issues filed by Tri-State against Broadstar, the Presiding Judge, by Order, FCC 89M-766, released March 13, 1989, specified the following issue against Broadstar:

> To determine whether BroadStar Communications, Inc., is qualified financially to construct and operate the proposed station.

3. This issue was added because Broadstar is a corporation wholly owned by Earnest L. James; that Broadstar also owns 100 percent of the stock of JACI, Inc., the licensee of AM Broadcast Station WCIN, Cincinnati, Ohio; that eight different tax liens have been filed against the licensee of WCIN; that one such lien is for federal taxes that amount to $41,759.34, which was filed last October; that the aggregate liens currently on file against WCIN are in excess of $77,000; that these liens have been filed by the federal government and various local and state agencies. In opposition to the request to add a financial issue, Broadstar relied exclusively for its financial qualifications on a $500,000 loan commitment letter from The Central Trust Company, N.A., dated April 6, 1987.

4. Presently under consideration are a "Motion for Summary Decision" filed by Tri-State on July 25, 1989; "BroadStar Communications, Inc. [Debtor-in-Possession] Opposition to Motion for Summary Decision" filed by Broadstar on August 7, 1989; and "BroadStar Communications, Inc. Debtor-in-Possession Erratum to Opposition to Motion for Summary Decision" filed by Broadstar on August 10, 1989. By its "Motion for Summary Decision," Tri-State requests that the Presiding Judge resolve the outstanding financial issue directed against Broadstar adversely to the applicant.

FINDINGS OF FACT

5. Broadstar is a corporation whose stock is wholly owned by Earnest L. James. Broadstar, in turn, owns 100 percent of the issued and outstanding stock of JACI, Inc., another corporation which is the licensee of AM Broadcast Station WCIN, Cincinnati, Ohio. When it filed its application, Broadstar relied for its financial qualifications on a commitment letter from The Central Trust Company, N.A., dated April 6, 1987. This letter offered to loan Broadstar up to $500,000 to be used for the construction and initial operation of the proposed broadcast station.

6. On May 5, 1989, Broadstar filed an amendment to its application withdrawing its reliance upon The Central Trust Company, N.A., letter. In its petition accompanying the amendment, Broadstar indicated that it intended to obtain new financing and would amend its application and show the availability of such financing. However, although more than three months have gone by, no such amendment has been filed. The amendment withdrawing Broadstar's reliance on the bank letter was accepted by Order of the Presiding Judge, FCC 89M-1487, released May 19, 1989. Clearly, as of May 5, 1989, Broadstar was lacking financial qualifications, because it had withdrawn reliance on the bank letter upon which its financial qualifications and financial certification were predicated.

7. On May 25, 1989, both Broadstar and JACI filed petition[s] with the United States Bankruptcy Court for the Southern District of Ohio, seeking the protection of Chapter 11 of the Bankruptcy Code (debtor-in-possession). Also, on the same date, Earnest L. James filed a voluntary petition seeking the protection of the Bankruptcy Court under Chapter 7 of the Bankruptcy Code. Copies of these petitions were attached to a petition for leave to amend filed by Broadstar in this proceeding under date of June 23, 1989. This amendment was ac-

cepted for reporting purposes by Order of the Presiding Judge, FCC 89M-1953, released July 26, 1989. As a result of these petitions, all of the stock of Broadstar has been transferred from Earnest L. James to Mark Greenberger, the personal trustee in bankruptcy for Earnest L. James. Additionally, all of the assets of Broadstar have become the property of the bankruptcy estate created as a result of the petition filed in the Bankruptcy Court for Broadstar.

8. On August 21, 1989, Broadstar exchanged its hearing exhibits in this proceeding.[2] With respect to the financial issue, Broadstar estimates that it will require $339,882.50 to build and operate the station for three months assuming no revenue.[3] To meet its financial requirements, Broadstar proposes that a new corporation be substituted for the applicant in this proceeding. This, it is alleged, will be accomplished by requesting the Bankruptcy Court to approve the removal of the Broadstar application from the bankrupt estate and transferring such application to a new corporation called NewStar Communications Corporation (Newstar) in which Earnest L. James would be the holder of 100 percent of the voting stock. Furthermore, the funds needed to prosecute the application and to construct and operate the proposed station would be provided to Newstar by Minority Broadcast Investment Corporation (MBIC). The terms and conditions of such proposed loan are set forth in a letter dated August 17, 1989, which is included as an attachment to Exhibit 3 exchanged by Broadstar. This letter states a "commitment to provide financing in the amount of $400,000 to NewStar Communications Corporation." The commitment letter by MBIC to Newstar further provides that the proposed lender would receive warrants to acquire a 60 percent equity interest in the new corporation. Thus, pursuant to the proposed financing for the new corporation, it appears that the equity ownership of Earnest L. James could be reduced from 100 percent to 40 percent, with the remaining 60 percent vested in MBIC. Thus far, the Bankruptcy Court has not approved the proposed arrangement, nor has Broadstar submitted a petition for leave to amend in which it attempts to substitute a new corporation as the applicant in this proceeding. It is clear that the proposed exhibits exchanged by Broadstar attempt to demonstrate the financial qualifications of a new entity (Newstar) which is not an applicant in this proceeding. Of equal, if not more, importance is the fact that there are no documents or other evidence demonstrating that the applicant in this proceeding, namely Broadstar Communications, Inc., Debtor-in-Possession, is financially qualified to build and operate its proposed station.

ULTIMATE FINDINGS AND CONCLUSIONS

9. An applicant, in order to be found financially qualified, must provide substantial and reliable evidence showing "sufficient net liquid assets on hand, or committed sources of funds to construct and operate for three months without revenue." *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989). The financial qualification of Broadstar was initially predicated on the availability of a $500,000 bank loan to meet the estimated cost of construction and three months' operation of $339,882.50. The applicant has withdrawn reliance upon this loan, and there is no evidence whatsoever that Broadstar is presently financially qualified to build and operate its proposed station. Indeed, no amendment has been filed by Broadstar demonstrating it has the necessary funds available to build and operate the station. Instead, Broadstar proposes, in the exhibits it has exchanged, to remove the Broadstar application from the bankrupt estate and transfer it to NewStar Communications Corporation (Newstar) in which Earnest L. James will hold 100 percent voting control. Newstar relies on a commitment letter from MBIC to finance the prosecution of the application and the construction and operation of the station.

10. What this demonstrates, however, is that the applicant before the Commission, namely BroadStar Communications, Inc., Debtor-in-Possession, is *not* financially qualified. The commitment letter to lend money to Newstar, which has not been substituted as an applicant in this proceeding, does not establish the financial qualifications of BroadStar Communications, Inc., Debtor-in-Possession, which is the applicant in this proceeding. There is no evidence, documentary or otherwise, establishing the financial qualifications of Broadstar.[4] More specifically, there is no evidence that Broadstar has available the necessary funds to meet construction and operating costs of $339,882.50. As a consequence, BroadStar Communications, Inc., Debtor-in-Possession, is financially unqualified, and the financial issue must be resolved against that applicant, and its application must be denied.[5]

11. Summary decision is appropriate where "no genuine issue as to any material fact" remains for determination at the hearing. *Valley Broadcasters, Inc.*, 3 FCC Rcd 6734, 6735 (1988); *Meredith Corporation*, 2 FCC Rcd 3927, 3928 (1987). As a result of the bankruptcy of Broadstar and its failure to establish its financial qualifications, there is no genuine issue of material fact for determination at the hearing. The facts are clear that this applicant is financially unqualified, and no useful purpose would be served by holding a hearing on such issue.[6]

12. With the denial of the Broadstar application, the only remaining applicant in this proceeding is Tri-State. No basic qualifying issues have been specified with respect to Tri-State and, with the denial of the Broadstar application, the comparative issue is moot, thereby permitting the immediate grant of the Tri-State application.

Accordingly, IT IS ORDERED that the "Motion for Summary Decision" filed by Vernon R. Baldwin & Billy W. Lanham d/b/a Tri-State Communications on July 25, 1989, IS GRANTED, and the financial issue specified against BroadStar Communications, Inc., Debtor-in-Possession, IS RESOLVED AGAINST that applicant;

IT IS FURTHER ORDERED that the application of BroadStar Communications, Inc., Debtor-in-Possession (File No. BPH-870408KD) IS DENIED;

IT IS FURTHER ORDER that the hearing scheduled to commence September 14, 1989,[7] IS CANCELLED;

IT IS FURTHER ORDERED that the application of Vernon R. Baldwin & Billy W. Lanham d/b/a Tri-State Communications (File No. BPH-870331PD) for a construction permit for a new FM station on Channel 282A, 104.3 MHz, in Harrison, Ohio, IS GRANTED.[8]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Administrative Law Judge

FOOTNOTES

[1] A further prehearing conference was held on July 21, 1989.

[2] The Presiding Judge withheld action on the "Motion for Summary Decision" until after the exchange of exhibits, so as to provide Broadstar with an opportunity to attempt to demonstrate its financial qualifications.

[3] This is broken down as follows:

Cost of Equipment and Installation	$ 212,382.50
Lease for Transmitter/Studio Site (5 months to reflect pre-operational period)	2,500.00
Three Months Operating Expenses	75,000.00
Legal, Engineering, and Other Expenses	50,000.00
TOTAL FUNDS REQUIRED	$ 339,882.50

[4] The application of Broadstar in this proceeding would appear to be an asset of the bankrupt estate. For example, it could enter into an agreement to dismiss such application in consideration of monetary payment. Such funds, it would appear, could be used to satisfy the claims of innocent creditors, one of which is the federal government, which has filed a tax lien in excess of $41,000. Why the Bankruptcy Court would allow such an asset to be removed from the bankrupt estate for the sole benefit of James, to the detriment of innocent creditors, is not clear. In any event, the proposed arrangement has neither been approved by the Bankruptcy Court nor has an appropriate amendment been filed with or accepted by the Presiding Judge.

[5] The Presiding Judge is aware of no precedent, and Broadstar has cited none, where a bankrupt estate has successfully prosecuted a construction permit application. There is a statutory requirement (Section 308(b) of the Communications Act of 1934, as amended) that applicants be financially qualified, and it is difficult to imagine how a bankrupt estate can meet this statutory requirement.

[6] Broadstar argues that it is entitled to demonstrate its financial qualifications at the hearing. But, the exhibits it has exchanged, clearly and absolutely, fail to establish the financial qualifications of Broadstar. Moreover, Broadstar's argument that Earnest L. James and Broadstar are being punished for exercising their statutory rights to seek reorganization under the Bankruptcy Code is rejected. Broadstar, as an applicant, is statutorily obligated to demonstrate its financial qualifications. It has failed to do so. To deny the Broadstar application for this reason does not constitute punishment resulting from Earnest L. James and Broadstar having sought reorganization under the Bankruptcy Code.

[7] By Order of the Presiding Judge, FCC 89M-2127, released August 22, 1989, the commencement of the hearing was rescheduled to September 14, 1989, rather than September 11, 1989.

[8] In the event that exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 48 C.F.R. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-25

In the Matter of

Compulsory Copyright License
for Cable Retransmission

REPORT
(Proceeding Terminated)

Adopted: October 27, 1988; Released: August 3, 1989

By the Commission: Chairman Patrick issuing a separate statement; Commissioner Quello concurring in part and dissenting in part and issuing a statement; Commissioner Dennis concurring and issuing a statement at a later date.

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I. INTRODUCTION

1. On February 12, 1987, the FCC adopted the *Notice of Inquiry* in General Docket No. 87-25, 2 FCC Rcd. 2387 (1987), seeking information to help evaluate the comparative advantages and disadvantages of the compulsory license for cable retransmissions and to determine whether it or some alternative would better serve the public interest. We indicated that the record accumulated in this proceeding could serve as the basis for a legislative recommendation regarding the compulsory license. That record has allowed us to compare the compulsory license to full copyright liability. Drawing on our communications policy expertise, we have weighed the costs and benefits of each regime and have concluded that the compulsory license should be abolished. We hereby recommend that the Congress re-examine the compulsory license with a view toward replacing it with a regime of full copyright liability for retransmission of both distant and local broadcast signals.

2. Our inquiry and recommendations are firmly grounded in the Communications Act, the basic purpose of which is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[1] Furthermore, the Commission is directed to make "specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable."[2] In 1984, Congress amended the Communications Act to add, for the first time, a title encompassing cable communications. A principal purpose of that title is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public."[3]

3. We are fully aware that Congress is the body with the authority and the responsibility for making copyright policy. Enforcement of copyright law is, of course, primarily the task of the judicial system. The expertise of the Federal Communications Commission is in the area of communications policy, not in the area of copyright. However, in the cable television area, communications policy and copyright issues have been intimately, perhaps inextricably intertwined from the start.[4] In essence, cable television has operated under a bifurcated system, with the Commission striving (via regulation and, later, deregulation) to structure a system capable of providing

the American public with a rich and diverse menu of video programming, one as closely matched as possible to viewer preferences and the Congress setting the property rights parameters within which the market for programming has operated.

4. Although a variety of services may be provided by cable, the bulk of cable service still consists of video programming. The quantity, quality, and diversity of that programming depends crucially on the terms under which it is acquired and distributed. Thus, it is appropriate for us to examine the process by which programming is provided to cable television systems, and to determine the impact on the public of disparate treatment of cable and other media, both old (*e.g.*, broadcasting) and new (*e.g.*, multichannel multipoint distribution service, direct broadcast satellite).[5] In the past, we have frequently confronted and considered questions of video program production and distribution. In connection with our regulation of television broadcast stations and networks, we have had occasion to analyze and, to a limited extent, regulate the production and distribution of such programming (*e.g.*, the financial interest and syndication rules, our 1980 network inquiry).[6] Moreover, from time to time, the Congress has called on the Commission's communications policy expertise for comment on matters of video program distribution. Our satellite signal scrambling inquiry is one recent example.[7]

5. The Copyright Act of 1976 was the first legislation that dealt explicitly with broadcasting and cable television retransmission of broadcast programming. It established that cable television systems are subject to copyright liability for the retransmission of broadcast signals.[8] The Act specified that liability in the form of a compulsory license for retransmission of broadcast signals, with compensation determined according to a statutory procedure.[9]

6. The legislative history of the Copyright Act of 1976, as embodied in the *House Report*, suggests that the primary reason for the choice of the compulsory license was Congress' judgment that the "transactions costs" (costs of negotiating licenses for cable retransmission) would be unacceptably high under full copyright liability.[10] Some observers suggest that Congress also acted out of concern that broadcasters might, in the absence of a compulsory license, withhold their programming from cable, thus depriving cable subscribers of access to broadcast signals that they were unable to receive over the air.

7. Our examination of the workings of the compulsory license system is focused on the current video environment and is designed to determine if the transactions costs of full liability are unacceptably high *today*, if there is a risk that cable subscribers could be foreclosed from access to broadcast programming *today*, and, most importantly, how would the range of programming available to the American viewer *today* be different under full copyright liability.

8. Our analysis suggests that American viewers would reap significant benefits from elimination of the compulsory license. As explained in some detail below, payments to copyright owners under the compulsory license almost certainly diverge from free market levels. This divergence harms viewers. Market rates, which are free to vary over time and across programs based on varying viewer preferences, provide an important flow of information regarding those preferences and furnish program producers with incentives to match their output closely to viewer demands. The compulsory license impedes this flow, to the detriment of the public interest in diverse and popular programming.

9. It appears that compulsory license rates are below market levels for some distant signals and above market levels for others, a situation that is possible because there is more than one rate category and the criteria for setting rate levels differ across categories.[11] Thus, full copyright liability could correct two types of distortion. In cases where the compulsory license rates are below market levels, full liability would bring higher rates and increased net revenues, providing increased rewards and incentives for the production of new programming. Such rate increases would change the relative price of, for example, distant broadcast signals and cable networks. In at least some instances, cable operators would delete distant signals and substitute cable networks for them. In cases where compulsory license rates are *above* market levels, full liability would likely lead to some additional cable carriage of distant signals.[12] This would yield new revenues to program producers.[13]

10. This discussion shows that the compulsory license hampers not only program production but program distribution as well. The artificial price structure created by the compulsory license distorts cable operators' choice between cable networks and distant broadcast signals. To the extent that compulsory license rates are below market rates, then cable operators' choices are inappropriately biased away from cable networks. In other words, the compulsory license may lead cable operators to offer a distant signal rather than a cable network that subscribers would prefer.

11. The compulsory license also distorts copyright holders' choice of distribution channel. Because of its wide coverage of local markets, broadcasting is a very efficient mode of distribution, particularly for programming with broad appeal. However, the compulsory license limits the ability of producers to control the geographic exposure of programming distributed via broadcast stations.[14] To the extent that alternative modes (*e.g.*, cable) are preferred solely because they allow more precise control of geographic exposure, the compulsory license reduces the efficiency of distribution. Concomitantly, in such situations, the return available to the producer is lower than it would be under full liability, and non-cable households are deprived of access to certain programming.

12. Thus, our examination suggests that, with full copyright liability, viewers would benefit from improvements in both program production and program distribution. Moreover, the existence today of literally dozens of cable networks that acquire rights to individual programs in the marketplace and package those rights for sale to cable operators suggests that, in the absence of the compulsory license, television stations would be able to acquire cable retransmission rights to "packages" of the programming that they broadcast. Cable operators could then negotiate with a single entity--the broadcast station--for carriage rights to each package. The cable network example provides convincing evidence that the transactions costs associated with full copyright liability are quite manageable. The "networking" mechanism that is so widely employed in other forms of video distribution appears well-suited to the acquisition of cable retransmission rights for broadcast signals too.

13. Under full copyright liability, individual broadcast stations could act as "retransmission rights packagers," analogous in some respects to cable or broadcast networks. Those stations that would acquire national cable retransmission rights would almost certainly be independent television stations, *e.g.*, WTBS or WGN.[15] At the local level, both independent stations and affiliates could act as retransmission rights packagers, acquiring *local* cable retransmission rights. In either case, the broadcast station would then market the retransmission rights that it had acquired to a group of cable systems, which would be analogous to "affiliates."

14. The viability of a full copyright liability regime is also supported by certain structural changes that have occurred in the cable industry since 1976, including the increasing size of multiple system operators and of individual cable systems. These developments have substantially reduced the transactions cost burden of full copyright liability on a per subscriber basis. On the other hand, ten years of experience with the compulsory license has demonstrated that there are significant transactions costs associated with *that* distribution mechanism.

15. Our evaluation of the compulsory license necessarily entails a comparison of the efficiency of program production and distribution with and without the compulsory license. This is an inherently difficult task, since it involves analysis of a hypothetical situation, but it is the only relevant comparison for public policy purposes. Thus, statistics regarding the health, profitability, or size of the program production industry or the broadcasting industry today are, in large part, irrelevant. Even if we were to find that these industries are "healthier" today than they ever have been, that would not support maintenance of the compulsory license.[16] The appropriate question is: "Would the consumer be better off without it?" Similar considerations apply to the assertions in the record that the cable industry is currently highly profitable. The issue is not cable industry profit levels but whether consumers would be better served, with respect to the range of programming available and the terms on which it is offered, by the compulsory license or by full copyright liability.

16. Our recommendation to eliminate the compulsory license is based on two conclusions.[17] First, under full copyright liability, consumers will benefit from a menu of programming, including new programming, that more closely matches their preferences and that is delivered by a more efficiently utilized group of delivery systems. Second, under full copyright liability, mechanisms will be available, with moderate transactions costs, to license programming to cable operators. Additionally, we believe that the arguments against the compulsory license and in favor of permitting producers to grant exclusive distribution rights to their programming have broad applicability.[18]

17. The remainder of this report is organized as follows. Section II provides background information on the development of cable signal carriage policy prior to 1976, passage of the compulsory license and its implementation by the CRT, and developments in the cable marketplace since 1976. Section III addresses the relationship between royalty rates under the compulsory license and those that would obtain under a full copyright liability regime, concluding that compulsory license rates generally diverge from what the market rates would be. It then compares the efficiency with which the program distribution system functions currently, and the range of programming available now, with the efficiency of program distribution and the program supply situation that would obtain in the absence of the compulsory license. The foreclosure issue is also considered in this section. In light of the improvements in program production and distribution that the analysis of Section III suggests would be associated with full copyright liability, Section IV examines the practicality of the alternative mechanisms that might be expected to arise in the absence of the compulsory license, considers the arguments of those who support retaining or merely modifying it, and summarizes available information on the transactions costs of the current system. Section V briefly considers the mechanics of the transition to full copyright liability. Section VI contains a summary and conclusions.[19]

II. BACKGROUND: Adoption and Operation of the Compulsory License

18. This section begins with a summary of the status of cable retransmission of broadcast signals prior to the Copyright Act of 1976 and a description of the adoption of the compulsory license. This account reveals the Commission's longstanding involvement in matters of program supply to cable systems. Next it explains the operation of the compulsory license system, stressing the determination of the Copyright Royalty Tribunal to replicate, to the extent possible, a free market. The final subsection describes the development of cable television since 1976, emphasizing its growth as a provider of nonbroadcast programming (spurred by the use of satellite distribution) in addition to the retransmission of television broadcast signals.

Cable Retransmission of Broadcast Signals Up to 1976

19. *The FCC and Distant Signal Retransmission*. Communications policy and copyright issues have been inextricably intertwined since the beginning of Commission efforts to establish appropriate policy with respect to cable television regulation. Over the past 30 years, the Commission has examined a variety of approaches to the regulation of distant signal importation. These have ranged from "retransmission consent" (a form of full copyright liability) to a scheme under which the Commission would authorize limited distant signal importation, with *local* stations supplying commercials to be inserted into that programming, and Congress would adopt a compulsory license.

20. In 1959, the Commission adopted its *Report and Order* in Docket 12443, an inquiry into the impact of cable television systems and other "auxiliary services" on "the orderly development of television broadcasting.[20] At that time, the Commission found "no present basis for asserting jurisdiction or authority over CATV's, except as we already regulate them under part 15 of our rules with respect to their radiation of energy." The Commission did, however, indicate its intention to recommend that Congress adopt two amendments to the Communications Act.

21. The *Report and Order* points out that Section 325 of the Communications Act was adopted in an effort to protect property rights in television programs by requiring stations rebroadcasting the signals of other stations to obtain "rebroadcast consent." The Commission stated its intention to request that Congress amend this section to include cable retransmission, finding that it is "desirable

to clarify the situation with respect to property rights and also "desirable to place the CATV under the same conditions as the broadcaster with respect to access to programs originated by other stations.[21] The other recommendation was for the Congress to require cable systems "to carry the signal of the local station if the local station so requests" (*i.e.*, must carry rules).[22]

22. By 1966, the Commission had asserted additional jurisdiction over cable television. The *Second Report and Order* in Docket No. 15971 dealt in part with the issue of "fair competition" between cable and broadcasting. It noted that cable systems were "outside of the . . . program distribution process," and could gain access to programming via distant broadcast signals without bargaining with or compensating the program supplier.[23] Citing the "anomalous conditions under with the broadcasting and the CATV industries compete," the Commission recommended that Congress consider applying the Section 325 retransmission consent provisions to cable television operators.[24]

23. In 1968, the Commission returned to "one of the fundamental policy questions in this area--the element of unfair competition."[25] The Commission proposed to adopt its own retransmission consent requirement.[26] In this connection, the Commission noted that

> We are not proceeding on some notion of unfair competition from the viewpoint of the Federal Trade Commission Act or the *Compco* or *Sears* cases. Nor are we concerned here with unfair competition from the aspect of the copyright owner. Rather, our concern is the public interest in the broadcast field--"the larger and more effective use of radio." That being the case, we must proceed to consider regulations to eliminate this aspect of unfair competition. (citations omitted)[27]

The Commission went on to point out that what appeared to be needed was a "meld of copyright, communications and antitrust policies," and that the Commission proposal, "while stemming from our responsibilities under the Communications Act necessarily also embodies considerations like copyright in its practical applications" (citations omitted).[28]

24. The Commission proposal was structured so as to allow some experimental operations under its provisions while the Rule Making proceeding was in progress. The results of the retransmission consent experiments reflected both the difficulties that cable systems faced in operating under essentially full copyright liability in that era as well as the fact that interested parties were undoubtedly trying to influence the Commission's deliberations and those of Congress, which was also actively reviewing cable television policy matters at that time.[29] The retransmission consent experiments were generally considered a failure,[30] and it was against this background that Congress began its serious consideration of compulsory licensing alternatives.

25. In 1970, the Commission put out for comment another proposal to deal with the "unfair competition" issue.[31] The Commission noted that the industry had shown little interest in the retransmission consent experiment and that the Commission was deferring further action on it while waiting for Congressional guidance in the copyright area. After explaining that the retransmission consent plan would protect UHF stations from "unfair competition," the Commission made a proposal designed to "affirmatively assist the elements of broadcasting most requiring aid--the independent UHF station and the public broadcasting system (ETV)," and to "do so in a way which can be fair to the copyright owner and will not undermine the healthy operation of all other stations in these markets."[32]

26. Under this plan, cable systems in the top 100 markets would be permitted to carry four distant independent signals, but would be required to delete commercials from those signals and replace them with commercials provided by local stations. The cable system would also be required to pay five percent of its subscription revenues to public broadcasting. In order to be fair to copyright holders, the Commission suggested that Congress could grant a compulsory license to cable systems for importation of these distant signals and set royalty rates for the cable systems to pay.[33] The Commission proposal included what was probably one of the first attempts to describe how rates under a compulsory license system might be set and how procedurally such a system might function.

27. The Commission terminated this and various other proceedings in 1972 when it adopted its *Cable Television Report and Order*,[34] comprising a new set of rules to govern cable television broadcast signal carriage. The new rules were adopted only after the Commission received the assurance of Senator McClellan, then-Chairman of the Senate subcommittee with responsibility for copyright legislation, that the new rules would facilitate pasage of legislation and with the pledge of the cable television, motion picture, and broadcast industries to support such legislation.[35]

28. The 1972 rules included, among other provisions, distant signal importation limits, syndicated exclusivity provisions, and must carry obligations with respect to local broadcast signals. The 1972 rules and all that went before testify to the bifurcated system that has long governed cable retransmission of broadcast signals: Commission regulation, guided by communications policy considerations of program diversity and the "larger and more effective use of radio," coupled with Congressional action to set the terms of copyright. With this background, we turn to a brief look at the application of copyright law by the courts to broadcast programming in the period prior to 1976 and at the adoption of the Copyright Reform Act of 1976.

29. *Broadcasting and Copyright Up to 1976.* Until the passage of the Copyright Reform Act of 1976, copyright legislation in the United States dealt primarily with the printed word and lacked specificity about much more than the number of years for which a copyright would run. Interpretations of what kinds of works were protected and what would trigger copyright liability were left to the courts; but the development of new communications technologies, including radio and television broadcasting, cable, and satellite transmission, made such interpretation increasingly difficult.

30. In particular, the Supreme Court, in a 1968 case involving local signals and a 1974 case involving distant signals, held that the definition of "performance" in the Copyright Act of 1909, then in effect, did not encompass cable retransmission.[36] As a consequence, the Court found that cable systems incurred no copyright liability whatsoever for retransmission of television broadcast signals. The Court recognized, however, that

> shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in the field, must be left to the Congress.[37]

Thus, the Court made no determination as to what would constitute appropriate copyright arrangements for cable retransmission of broadcast signals and encouraged the Congress to enact legislation dealing with such arrangements.

31. Congress was not unaware of the inadequacies of existing copyright law, not only with respect to cable television but also with respect to photocopying, computers, and other technological advances that were not contemplated in the 1909 law. With respect to cable television, bills were introduced in 1964 and 1965 that would have explicitly held cable fully liable for signal retransmission, although many in the Congress apparently believed that such liability was already implicit in the existing law.[38] Subsequent bills, culminating in the 1976 Act, began to move away from the principle of full copyright liability, however, and the cable compulsory license was included in section 111 of the Act as one of several exceptions to the general granting of exclusive rights in section 106 of the Act. The justification offered for substituting the compulsory license for full copyright liability was that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system."[39]

32. In the 1976 Act, as in its predecesor, Congress chose to rely heavily on market mechanisms to encourage and reward creative activity. The 1976 Act contains a general grant of "Exclusive rights in copyrighted works," conferring on the copyright owner the "exclusive rights to do and to authorize" various uses of the work, including "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly."[40]

33. For the first time, television broadcasting and the cable retransmission thereof are addressed. The 1976 Copyright Act provides that cable retransmission of broadcast signals *is* a "public performance" of audiovisual works and *is* subject to copyright liability.[41] Nevertheless, Congress limited the exclusive rights of copyright holders of audiovisual works by imposing a compulsory license for cable television retransmission of broadcast signals.[42]

The Compulsory License and the Copyright Royalty Tribunal

34. The compulsory license became effective on January 1, 1978. Under the compulsory license, cable systems make royalty payments every six months to the U.S. Register of Copyrights, an agency of the Library of Congress. The Register of Copyrights places the money in an escrow account and maintains the "Statement of Account" that each cable system files. The Copyright Royalty Tribunal (CRT), also created by the 1976 Act, is an independent agency charged with distributing the royalties to copyright claimants. It also has the task of adjusting the rates.

35. *Royalty Rates and Their Adjustment* The initial rates were set in the 1976 Act. The Act provides that the CRT may adjust the royalty rates in response to inflation and in the event of changes in certain FCC rules.

36. In order to maintain the "real constant dollar level of royalty fee per subscriber" that was in effect at the time the Act was adopted, the CRT is authorized to adjust rates to reflect changes in the general price level and changes in average basic cable subscription rates.[43] If basic cable rates rise faster than the price level, then no adjustments under this provision will be made. The statute specified that the CRT should initiate such a proceeding in 1980. Subsequent adjustments are to be made by the CRT in response to petitions from copyright owners or from users of their works who have a "significant interest" in the rates. Such petitions may be filed every five years, starting in 1985.

37. In addition to authorizing "inflation" adjustments, the statute also directs the CRT to revise the royalty rates if the Commission's distant signal, syndicated exclusivity, or sports exclusivity rules are changed from those in effect on April 15, 1976.[44] The Commission eliminated its distant signal limitation and syndicated exclusivity rules on July 22, 1980, and these actions became effective on June 25, 1981, after they were upheld on appeal.[45] These actions constrained the ability of copyright owners to control distribution of their product. As directed, the CRT then instituted new rates designed to compensate copyright holders for this disadvantage. These rates, which apply to Form 3 systems only, were adopted on October 20, 1982, and they took effect on March 15, 1983.[46] Those systems that carry more distant signals than were permitted by the FCC rules of June 24, 1981 pay the "3.75" or "Malrite" fee. Systems in the top 100 television markets also pay a "syndicated exclusivity" fee.[47]

38. Cable systems are classified by semiannual gross receipts into three groups, for the purpose of rate calculation.[48] Currently, after various adjustments, there is a group for which semiannual gross receipts are less than or equal to $75,800, a group for which those receipts are greater than $75,800 but less than or equal to $292,000, and a group for which those receipts are greater than $292,000. The systems in the three groups are called "Form 1," "Form 2," and "Form 3" systems (after the statement of account forms that they need to fill out). In fact, both Form 1 and Form 2 systems now use the same form.[49]

39. Form 1 systems currently pay a flat fee of $28.00 per six-month reporting period, while Form 2 systems pay according to a formula, based on the gross receipts figure, that yields a *maximum* payment per six-month reporting period of $2,190.[50] Form 1 and Form 2 systems incur their full liability under the compulsory license with the first broadcast signal that they retransmit. The incremental cost to such cable systems of additional broadcast signals, distant or local, is zero.

40. While all systems must report signal carriage, Form 3 systems are the only ones for which this information is used in calculating the royalty payments.[51] They are also the only ones that must report which signals carried are distant and which are local. In essence, the royalty payments are determined by the number and type of distant

signals carried by a Form 3 cable system. While these systems are required to make a payment "for the privilege of further transmitting any nonnetwork programming," even if they carry no distant signals, this fee may be applied against the system's distant signal liability. Cable systems that carry one or more "distant signal equivalents" in effect pay nothing for retransmitting local signals.[52]

41. Gross receipts are described in the Act as "the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters."[53] The Copyright Office, which is responsible for collecting the fees from cable operators and maintaining the statements of account, defined gross receipts as "the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals."[54]

42. That definition was challenged by Cablevision Systems Development Company, a cable television multiple system operator. In essence, Cablevision claimed that cable operators should be able to allocate their monthly basic service fees among broadcast and non-broadcast services and that only the share attributable to broadcast services should constitute "gross receipts." The effect of this would be to reduce significantly the royalty payments of cable operators. Cablevision won its case at the district court level, but the appeals court reversed and remanded it.[55] While the case was on appeal, the Copyright Office adopted the procedure of permitting cable operators to make their own gross receipts calculations and accepted contributions based on them. However, cable operators also were required to calculate and report what their contribution would be under the Copyright Office definition of gross receipts.[56]

43. *Royalty Distributions.* Table 1 shows the amounts of money distributed by the CRT under the cable compulsory license. For 1978-84, all of the funds collected have been distributed. For 1985, virtually all funds have been distributed. The 1986 distribution is incomplete. Since 1983, the fund has been made up of three components. Based on the most recent (1985) distribution, the basic fund accounts for roughly 60 percent of the total and the "3.75" and syndicated exclusivity funds account for roughly 20 percent each.

44. The CRT uses the following procedure to distribute the royalties to copyright claimants.[57] Each July, all who claim to be entitled to a share of the royalties must file a claim with the CRT. The Act provides claimants with an exemption from the antitrust laws so that any group of claimants may "agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf." If the CRT finds that no controversy exists regarding the distribution, it then disburses the funds, after deducting its own "reasonable administrative costs under this section." (*See* table 3 in appendix C). If a controversy does exist, then the CRT conducts a proceeding to determine how the royalties should be distributed. During the pendency of such proceedings, the CRT may distribute amounts that are not in controversy, but it is required always to hold back funds sufficient to satisfy all claims over which a controversy exists.

Table 1

Cable Television Royalty Fund Distributions

Year	Total Size of Fund
1978	$17,717,000
1979	23,732,000
1980	28,052,000
1981	35,559,000
1982	44,375,000
1983	84,317,000[a]
1984	100,465,000[a]
1985	113,264,000[a]
1986	119,025,507[a,b]
1987	155,454,004[a,b]
1988	91,810,554[b,c]

Sources: For 1978-85 collections and distributions and 1986 distributions: *Annual Report of the Copyright Royalty Tribunal for the Fiscal Year Ending September 30, 1987 (1987 Annual Report of the CRT);* CRT "Summary Fact Sheet" January 1988; CRT Files. For 1986-88 fees paid: U.S. Copyright Office.

Notes: 100 percent of the fund has been distributed for 1978-84; 99.55 percent has been distributed for 1985. For 1986, $62,869,000 has been distributed. No distributions have been made for 1987 and 1988.

a For these years, the total fund includes basic, 3.75, and syndicated exclusivity fund segments. The percentage composition of the total for 1983-85 is

	1983	1984	1985
Basic Fund	61.6%	57.1%	59.5%
3.75 Fund	16.7	22.3	20.4
Syndicated Exclusivity Fund	21.7	20.6	20.1

b These figures represent total collections, not including accrued interest

c Collections for first six-month accounting period only.

45. CRT royalty distribution proceedings are conducted in two parts.[58] In "Phase I," the CRT allocates cable royalties among categories of program. A division among individual claimants within program categories is made, where necessary, in "Phase II." In 1978, there were six Phase I copyright owner groups. They were: Program Suppliers, Sports, Public Broadcasting Service (PBS), Music, US and Canadian TV, and National Public Radio (NPR). NPR received no allocation in 1978, but has received something in all subsequent distributions. In 1979, the television claimants split into two groups--Commercial TV (represented by the National Association of Broadcasters) and Canadian TV. In 1980, a separate category of "Devotional Claimants," producers of certain religious programming, was added. These eight groups have been the Phase I participants in all subsequent distribution proceedings. These groups were able to reach settlement agreements without CRT litigation in 1981, 1984, and 1985.

46. There has been a Phase II controversy every year (the years for which the distribution is complete are 1978-85). In 1978 and 1985, there were controversies in the Music category, while in 1982 there was also a controversy in the Sports category. In the program suppliers category, there have been controversies in every year except 1978. Virtually all of the program suppliers have chosen to be represented by the Motion Picture Association of America (MPAA), but a few have not. In 1985, the only other claimant in this category was Multimedia. In some of the earlier years, the National Association of Broadcasters (NAB), the Spanish International Network, certain religious programmers, and Mutual of Omaha had submitted separate claims (not all of these submitted separate claims each year).

47. Although there have been controversies almost every year, it is nevertheless true that the private process of consolidating claims has simplified the distribution. In 1985, for example, 696 individual or joint claims were filed, but they were consolidated into eight groups.[59] This simplification (compared to a more detailed administrative allocation procedure) is, of course, welcome. However, it should not be confused with improved efficiency in a market sense. The divergence between compulsory license rates and market compensation levels may be little affected by the claim consolidation process.[60]

48. The CRT formulated its royalty allocation principles in its first (1978) distribution proceeding. The key criteria were described in the following manner.

> The Tribunal determined the primary factors to be:
>
> (a) the harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems,
>
> (b) the benefit derived by cable systems from the secondary transmission of certain copyrighted works, and
>
> (c) the marketplace value of the works transmitted.[61]

The first factor can be interpreted as the minimum amount that copyright owners would have to be paid in order to induce them to allow cable retransmission of their programming. The second factor can be interpreted as the maximum amount that cable operators would be willing to pay in order to retransmit the copyrighted works. In other words, these are the upper and lower bounds on the "marketplace value" of those works. The Court of Appeals decision upholding the CRT's 1978 distribution and its methodology notes in passing that the CRT endorsed the proposition that these two factors "involve a marketplace-type inquiry."[62] In essence, then, all three primary factors involve an attempt to replicate a market result.

49. After enumerating the factors it would consider in allocating royalty funds, the CRT expanded as follows on its distribution methodology:

> The Tribunal concluded that the allocation must take primary account of market factors in an effort to *simulate market valuation*. It is our opinion that the compulsory license was established by Congress to compensate for a perceived deficiency in the unregulated market . . . The evidence in this proceeding indicates that the usefulness and application of the compulsory license is limited to the market inadequacy which justifies its existence. Congress and the courts have recognized that, in our economic system, *resources are most fairly and efficiently allocated by a market system*. The Tribunal decided that it was not the legislative intent of the Act to alter market valuation and return . . . Thus by assigning the relative weight to marketplace value, we determined not to impair the free play of market forces, subject to the limitation necessarily imposed by Section 111.[63] (emphasis added)

Thus, by its own declaration, the CRT has set as its goal the replication of a market outcome to the extent possible.

50. The 1978 proceeding took place when all compulsory license payments were made pursuant to the basic rates. As noted above, these rates were initially set by statute, and adjustments in them are limited to compenation for inflation. Hence, basic rates cannot be adjusted to replicate market levels. Indeed, when the CRT added the distant signal and syndicated exclusivity fees, it provided the following assessment of the statutory basic royalty rates.

> The Tribunal judged that the current statutory rates could not be considered those that would result from full marketplace conditions if the compulsory license did not exist. The rates were established as a legislative compromise, they are arbitrary, and they were intended to require only a minimum payment on the part of cable operators. The insistence by the cable operators on retaining the compulsory license is, in the Tribunal's judgment, an indication that *its cost to them is lower than what they would have to pay in the free market.* (emphasis added)[64]

Basic royalty rates still account for 60 percent of total compulsory license royalty collections. Thus, the statutory limitation on the CRT's ability to "simulate market valuation," appears to remain significant.

51. The proceeding to adjust the royalty rates to compensate for the repeal of the Commission's distant signal importation limits and syndicated exclusivity rules also suggests that the CRT has endeavored to simulate market results whenever it has had the opportunity to do so. When it established new rates in this proceeding, the CRT decision described its Congressional mandate as to "assure that such rates are reasonable in light of the changes to such rules and regulations."[65] The CRT explained its method of determining the new distant signal rates in the following fashion.

> In the absence of a free market or any marketplace directly analogous to that for distant signals, the Tribunal looked for its initial guidance to the marketplace analogies presented by the copyright owners and to the value for their programming that they derived from them. Then, on the basis of its judgment and the record as a whole, the Tribunal made a downward adjustment for what it considers

the difference between these marketplaces and the marketplace for distant signals. The Tribunal concluded that a fair and reasonable rate for each additional distant signal is 3.75%.[66]

The Court of Appeals has upheld both the CRT's methodology and its results.[67]

Marketplace Developments Since 1976

52. In recent years, cable television has evolved in its content and expanded massively in the scope of its distribution system. In addition, the number of households with home satellite dish antennas has increased significantly over the past five years. These changes are examined in this subsection, along with relevant FCC rule changes in this period, and the implications of structural changes in the cable industry for transactions costs.

53. *Evolution of the Cable Industry*. The period since 1976 has brought enormous changes to the cable television industry. In 1976, cable television was primarily a retransmission medium for broadcast signals. Today, it is an active participant in the program distribution marketplace, supporting dozens of full copyright nonbroadcast cable networks. One recent compilation lists 47 basic cable services (of which six are satellite-delivered broadcast signals), eight pay services, five pay-per-view services, and 14 sports services (mostly regional).[68] The total is 74 services (68 without the broadcast signals). An alternative compilation includes 50 national satellite-delivered basic services (of which four are broadcast signals), 10 national satellite-delivered pay services, and six nonsatellite-delivered national services, as well as 15 regional basic services (one of which is a broadcast signal) and nine regional pay services (mostly sports).[69] The total is 81 (76 net of the broadcast signals). A 1987 listing prepared by the MPAA includes 84 services: 49 national basic services, nine national premium services, four national pay-per-view services, and 22 regional services (pay and basic).[70] Not included in these figures are 17 satellite-delivered "superstations" (seven independents and 10 network affiliates). By contrast, in 1976 there was *one* national cable network--Home Box Office. It had begun satellite distribution in 1975. There was also one superstation--WTBS in Atlanta--which began satellite distribution in December of 1976.[71]

54. The proliferation of readily-available cable networks has reduced the relative importance of broadcast signals, distant ones in particular, as a source of programming for cable systems. Available data show that the average "Form 3" cable system carried 3.381 distant signals in July of 1986. The comparable figure for July of 1980 is 3.768.[72] These data are based on the statements of account that cable systems file with the U.S. Copyright Office as part of the compulsory license procedure. Thus, 1976 figures are not available. However, since the Commission's distant signal importation rules were still in effect in 1980, the 1976 average is unlikely to be much higher than that for 1980, and could indeed be lower. When the Commission eliminated the distant signal rules, effective in 1981, many cable systems took advantage of it to add new distant signals. The decline in the average from 1980 to 1986 masks the fact that many systems added such signals.[73]

55. The cornucopia of cable programming has been made possible by a substantial growth in cable distribution capacity. This growth has, of course, involved substantial investment by the industry in cable facilities, but it has also been assisted by technical and regulatory advances that have significantly reduced the cost of satellite distribution.[74] The availability of low-cost national distribution facilities via satellite has made entry into the cable network business much easier and made it possible for relatively small scale entrants to survive.[75]

56. The scope and capacity of cable television systems have also increased markedly over the last 12 years. In 1976, only 17 percent of television households were cable subscribers, while 30.9 percent of television households were passed by cable.[76] Currently 53.8 percent of television households subscribe to cable, and 81.7 percent are passed by cable.[77] Moreover, today cable systems offer substantially increased channel capacity. In 1976, only 12 percent of cable systems offered over 20 channels, while in 1987 65.5 percent of systems offered 20 or more channels. In 1976, 76.3 percent of systems offered 12 or fewer channels, while the comparable 1987 figure is 20.5 percent.[78] In 1987, a full 91 percent of cable subscribers had access to 20 or more channels, while 77 percent had access to 30 channels or more.[79] The cable distribution system has thus expanded significantly and can now support a large menu of nonbroadcast programming.

57. Moreover, the growing number of households (now roughly two million) with home satellite dish antennas makes satellite distribution even more efficient and attractive for programmers.[80] Congress has recently extended the compulsory license to cover retransmission of broadcast signals by satellite carriers for private home viewing.[81] This compulsory license will remain in effect until December 31, 1994. In the case of stations affiliated with the three major commercial networks, the license applies only to unserved households (*i.e.*, those that are without off-air access to network affiliates and have not been cable subscribers for 90 days prior to their subscription to a satellite carrier's service).[82]

58. *Changes in FCC Rules*. As noted in the previous subsection, the Commission eliminated its distant signal and syndicated exclusivity rules in 1981. As a result, more distant broadcast signals are available to cable systems now than were available in 1976. In 1988, the Commission reimposed syndicated exclusivity rules. The new syndicated exclusivity rules are broader in scope than the earlier version. The new rules have not yet taken effect, so their impact cannot be gauged precisely. The rules could reduce the attractiveness of some distant signals to cable operators, although the managers of some prominent superstations have indicated that they will make adjustments to maintain their cable carriage.[83] In any event, distant signal availability is likely to remain above 1976 levels.

59. In 1977, the Commission's "anti-siphoning" rules were struck down by the court of appeals.[84] These rules had placed stringent limits on the ability of cable systems to acquire programming such as sports events and feature films for exhibition on pay channels. The elimination of these rules fostered the development of pay channels, thus increasing the array of non-broadcast programming available to cable subscribers.

60. Cable operators gained additional programming flexibility in 1985 when the courts struck down the Commission's must carry rules.[85] A Commission attempt to revise the rules to meet the court's concern over their constitutionality was unsuccessful.[86] Currently, then, cable operators have no local carriage obligations but are en-

titled to carry whatever local stations they choose. However, the royalty system is structured such that, once a cable system carries a single broadcast signal, distant *or* local, it may carry all other local signals without paying any additional fee. In practice, then, local signals are available to cable systems virtually without payment.[87] In general, FCC rule changes since 1976 have increased the program options available to cable operators, although the new syndicated exclusivity rules do impose some limitation.

61. *Changes in Cable Industry Structure.* Due to the increased incidence of multiple system ownership in the cable industry, the relative importance of transactions costs has fallen since 1976. There are undoubtedly some fixed costs of setting up a copyright rights negotiation operation at a cable system. Leaving aside the fact that cable systems already must do some work of this nature to secure rights to *cable* networks, it is likely that, for a cable system, the transactions costs are a function of the number of transactions and the number of transactors. We argue *infra* that, under full copyright liability, cable operators are likely to negotiate with broadcast stations (local and distant) for retransmission rights that those stations have acquired from program owners. Hence, the transactions costs facing a cable system are likely to be related to the number of broadcast signals it carries. Because the cost of negotiating carriage rights does not vary significantly with respect to the number of subscribers on whose behalf the negotiation is taking place,[88] the burden of a particular absolute amount of transactions costs is also related to the size of the negotiating unit--MSO or individual cable system. In particular, the burden will be lower when transactions costs are spread over a larger number of subscribers.

62. Data are available on the average number of *distant* broadcast signals carried by cable systems. The figures suggest that this average has remained virtually constant over the relevant period.[89] No data are available on the average number of broadcast signals carried per cable system. A very crude indicator of changes in local signal carriage may be constructed by calculating the percentage increase in the number of television stations on the air from 1976 to the present. For commercial stations, the figure is 50.2 percent; for all television stations, it is 44.6 percent.[90] These increases, while substantial, are significantly smaller than the increases in subscribership accounted for by MSOs and large individual cable systems.[91]

63. From 1976 to the present, there has been a tremendous increase in the number and share of cable subscribers served by MSOs and large individual cable systems. In 1976, the top 50 MSOs accounted for 7.4 million subscribers (68.7 percent of the total). In 1987, the top 50 MSOs accounted for 34.9 million subscribers (83.1 percent of the total).[92] In other words, the 50 largest negotiating units accounted for 4.7 times as many subscribers in 1987 as in 1976. Furthermore, according to NTIA, small cable systems are quite likely to be part of MSOs.[93] It is true, nevertheless, that a number of cable systems, albeit with a very small share of total subscribers, are not affiliated with MSOs.

64. Another dimension of size is also worth considering. The number and size of very large individual cable systems have also been increasing significantly. *Television Factbook* provides information on cable systems with over 20,000 subscribers.[94] In 1976, there were 68 such systems, with an average of 32,143 subscribers each. In total, 20.2 percent of cable subscribers were affiliated with "large" cable systems. In 1987, by contrast, 464 systems had more than 20,000 subscribers each. The average number of subscribers was 46,536, and *54.4 percent* of cable subscribers were affiliated with these "large" systems. Thus, even if some copyright license negotiations need to be conducted on an individual system basis (*i.e.*, those for retransmission of local broadcast signals), the majority of cable subscribers are now in big systems, so those fixed costs can be spread over a larger subscriber and total revenue base than was the case in 1976.

III. The Marketplace Today: Are Consumers Well Served by the Compulsory License?

A. *Introduction*

65. The previous section has documented how different today's television marketplace is from the one that existed in 1976 when the cable compulsory license was incorporated into U.S. copyright law as an exception to the general principle of relying heavily on market mechanisms to encourage and reward creative activities. In this section we examine whether such an exception continues to be warranted in today's marketplace. Our discussion focuses on the inherent difficulties an administrative agency like the CRT faces in trying to establish market rates and on the costs to consumers of having compulsory license rates diverge from market rates.

66. As described previously, cable systems that transmit distant broadcast signals are required to pay royalty rates that are a function of the size of the cable system and the number of distant signals the system carries. These royalties are then distributed to program suppliers by the Copyright Royalty Tribunal. In a market system, in contrast, program suppliers would be free to determine how they would distribute and charge for their programs and cable systems would have full copyright liability for all programs carried on distant signals they retransmitted.[95] If compulsory license rates exactly matched market rates, and if decisions about how programs are supplied and distributed were the same under either system, the choice between marketplace negotiations and the compulsory license could be resolved on the basis of which system had the smaller transactions costs. In fact, however, there are many reasons to believe that compulsory license rates do not match market rates for programs carried on distant signals and that, as a result, consumers do not get so rich and diverse a mix of programming under the compulsory license as they would get under full copyright.[96]

B. *The Failure of the Compulsory License to Produce Market Prices*

67. The compulsory license substitutes an administratively-set fee for a market price, and there is no link between the value of any particular program to the cable operator and the compulsory license fee he pays. Although it is theoretically possible that the compulsory license fees paid by cable systems are exactly equal to the value of the programs they receive and that the payments distributed by the CRT to program suppliers are in exact proportion to the values of the particular programs supplied by particular suppliers, such a result is highly improbable.

68. In an Appendix to MPAA's comments, economist Stanley Besen suggests three reasons why the result described is unlikely to occur:

> First, the administrative process by which fees must be established will generally lack the information required to set the level of fees appropriately. Moreover, the way in which the compulsory license fees were initially established for cable was based principally on an assessment of how much cable systems could "afford" to pay rather than on a determination of the economically efficient fee.
>
> Second, the CRT lacks the information and ability to distribute the fees collected according to the value of individual programs.
>
> Finally, a fee established by an administrative body is difficult and costly to change and will therefore be unresponsive to changing economic circumstances.[97]

69. The compulsory license fails to achieve market prices in three areas. First, compulsory license royalty rates are based on the size of cable systems and on the number of signals carried, not on the value of particular programs carried on particular signals; yet it is the latter information, which would be embodied in market prices, that conveys valuable information to program suppliers and distributors about what kinds of programs viewers most want to see. Second, in most cases, and on balance, logic and evidence suggest that the compulsory license rates paid by cable systems and hence the distributions made by the CRT to program suppliers, are below market prices. As a result, program suppliers as a group have less incentive to supply programs valued by consumers than they would have if they received full market value for their works. Third, steps taken by the CRT to consolidate claims, however valuable they may be in simplifying the administration of compulsory license royalty distributions, inevitably reduce the targeting of compulsory license fees to individual producers based on the value of their individual programs to consumers, whereas market prices would be negotiated between program suppliers (or their agents) and cable systems (or their agents) on the basis of individual program values.

70. ABC asserts that this first failure is inherent in the way compulsory license fees are set, commenting that

> [A] fixed . . . price necessarily harms program owners and viewers. The effect can be most easily illustrated by imagining the impact on the delivery of nonbroadcast cable service if all such services--from HBO to the Weather Channel--were required by the government to be sold at the same price. Even if the price fixed were a fair estimate of the "average" value of the various program services, it would send incorrect signals about every one of them, precisely because it is an average.[98]

The logical case for the proposition that compulsory license rates are generally below market rates was made by the CRT, citing the cable operators' insistence on maintaining it.[99] The comments in this proceeding adhere to the same logic. Program producers, who must sell their product at the statutory rates, oppose the compulsory license. Cable operators, who are permitted to purchase product at these rates, support it.

71. The empirical evidence that compulsory license rates are below market prices is strongest for Form 1 and Form 2 systems, which serve about 20 percent of all cable households.[100] These systems incur their full copyright liability with the first broadcast signal they carry, whether it is local or distant. All subsequent broadcast signals may be transmitted at no additional charge. It is logically possible that some Form 1 systems would pay the compulsory license fee to carry a distant signal but would not pay it to carry a local signal; it is also logically possible that some of a Form 2 system's royalty is based on gross receipts that it would not earn if it did not carry any distant signals; but as a practical matter, distant signals are free to most of these systems. Thus, for all intents and purposes, cable systems serving 20 percent of cable subscribers pay nothing at all for the valuable programs they acquire through distant signal retransmission.

72. Royalties paid by Form 3 systems do increase with the number of distant signals carried and with gross receipts from distant signal carriage, but the limited evidence available evidence suggests that average royalty rates are below market rates for these systems as well. Major League Baseball (MLB) provides data indicating that when it was receiving 0.5 cents per subscriber per game under full copyright from the USA cable network it was receiving only 0.07 cents per subscriber per game (seven times less) from games exhibited via distant signal.[101] Another illustration of the divergence between cable compulsory license rates and market rates is provided by the Association of Independent Television Stations (INTV), which quotes from a filing of TVX Broadcast Group, Inc. regarding its Norfolk, Virginia independent station. That filing asserts that "the average cost per half-hour of duplicated syndicated programming" for that station was $583.82, while "all cable systems in the Norfolk market carrying "superstation" WTBS Atlanta paid a combined copyright royalty fee of $15.41 per half-hour, or 38 times less."[102]

73. MPAA commissions a special viewing survey each year for use in CRT distribution proceedings. The latest available one, for 1985, reveals that 752,000 quarter hours of non-network programming were supplied to cable systems via distant broadcast signals.[103] With a total royalty fund of $113 million in 1985, this is equivalent to roughly $150 per quarter hour paid by cable systems as a whole to program suppliers as a whole. Although it is impossible to know for certain what this programming would have commanded in free-market negotiations, the examples offered by MLB and TVX suggest that the market value might be several multiples of the $150 per quarter hour collected through the compulsory license process. Proponents of the compulsory license have not offered any information that would refute this observation.

74. Although cable compulsory license rates are generally below market prices, there are some circumstances in which the compulsory license fee exceeds the market value of a signal, in which case the cable system will choose not to carry the signal because the value of the signal is less than the cost of acquiring it. After the FCC rules limiting the number of distant signals a cable system could carry were eliminated in June 1981 (along with syndicated exclusivity rules), many cable systems added

distant signals at the compulsory license fees then in effect. Pursuant to the Copyright Act of 1976, however, the CRT instituted a proceeding to adjust the compulsory license royalty rates to take account of the elimination of distant signal limitations and syndicated exclusivity. The rates that went into effect in March 1983 were higher for "nonpermitted" signals, *i.e.*, signals in excess of the number permitted under the prior rules, than they were for "permitted" signals. This increase in the rate for nonpermitted signals (3.75 percent of the relevant gross revenue for each signal) led to cable systems' dropping a substantial number of signals that they had added at the old rate during the previous two years.[104] The obvious implication is that the market value of these signals lay somewhere between the old rate and the new, but that at the new rate is was uneconomical to continue to carry those signals.

75. Although it might be possible for the CRT to refine its estimates of the market value of distant signals and bring the average fees collected more nearly in line with the average value of programs, statutory limits on basic rates interfere even with that goal. Worse, there appears to be no satisfactory administrative solution to the problem of closely approximating market prices for individual programs, either in the fees charged cable systems or in the distributions made to producers. Administratively-set prices are a poor substitute for market prices when the goal is to provide incentives to suppliers to meet consumer demands. We wish to emphasize that these conclusions do not constitute criticism of the way the CRT has carried out its duties. It is inherently impossible for any administrative agency, even one with substantially more funding than the CRT has, to gather and process in a timely manner the vast amounts of information needed to replicate market prices.

C. *Full Copyright, The Compulsory License and Consumer Welfare*

76. However dependent the cable industry may have been on distant signals in 1976, today cable is a healthy industry, well accustomed to negotiating in the marketplace for the rights to show programs. Therefore, we question the claims of those commenters in this proceeding opposed to replacing the compulsory license with full copyright liability that the result would be to deprive cable viewers of programs they want and to subject them to blackouts or other reductions in program availability. Rather, we conclude that television viewers generally, including cable viewers, will have enhanced program choices and a richer and more diverse video marketplace if our recommendation to replace the compulsory license with full copyright liability is adopted.

77. Our fundamental argument is that the cable compulsory license has weakened incentives to supply new programs compared to what they would be under full copyright liability at the same time the expansion of cable and other alternatives to traditional broadcasting have increased the demand for new programs. Thus, the gap between the potentiality to deliver programs and the programs actually being delivered is widening. Moreover, the cable compulsory license has distorted incentives to supply programs to the appropriate distribution outlet and hampered the development of an efficient complement of program exhibitors compared to the development that would take place under full copyright liability.

78. This distinction between what is and what could be is overlooked by those defenders of the compulsory license who argue that programming choices have expanded greatly during the past several years and that program suppliers and broadcasters are flourishing.[105] Moreover, it is an impossible standard of proof to ask those who argue that there is a gap between what is and what could be to enumerate the programs that are not being produced but that would be produced under full copyright. We do believe, however, that there is a compelling logic to the argument that the compulsory license has an adverse effect on program supply and distribution compared to full copyright and that there is good evidence to support this logic.

79. The primary justification for the cable compulsory license was the assertion that it would be prohibitively expensive for every cable operator to negotiate with the producer of every program carried on a distant broadcast signal the cable operator was proposing to retransmit. Nevertheless, the market has proved to be a remarkable mechanism for economizing on transactions costs and efficiently conveying information back and forth between consumers and producers so as to match consumers' demands with producers' ability to satisfy those demands. It is impossible to know for certain, however, exactly how the market will solve any particular coordination problem without actually letting the market develop. Nevertheless, we shall suggest in this report some of the ways that market negotiations in a full copyright regime could replace the cable compulsory license.

80. The clearest statement of the economic case against the compulsory license that appears in the comments submitted in this proceeding is the *Besen Statement*.[106] Besen identifies three major areas in which the existence of the compulsory license rather than full copyright hurts the viewing public:

> First, the compulsory license reduces the payments to suppliers of programs to broadcast television below the levels that they would obtain in free market transactions and thus reduces the volume of resources that is devoted to the production of such programs. This, in turn, reduces the quality of programs available to the viewing public.
>
> Second, the compulsory license creates an advantage for cable television operators over local broadcast stations and other competitive distributors of television programs, such as direct broadcast via satellites, that must negotiate for all of their programs in a free market. This leads to an inefficient mix of the way in which television programs are distributed to the viewing public.
>
> Finally, the compulsory license, by reducing the prices of retransmitted signals below their values in a free market, disadvantages cable-only networks which must compete with retransmitted broadcast signals for channel space on cable systems. The result is to reduce the resources available to these services and thus to lower the quality of programming available to viewers.[107]

Although our discussion will not be confined to the points raised by Besen, we find his arguments a useful starting point for discussing the failure of the compulsory license with respect to a) incentives to supply programs and b) incentives to distribute programs efficiently.

81. The argument that the compulsory license reduces incentives to develop new programs below what they would be under full copyright begins with the observation that program producers respond to economic incentives and that the amount of resources devoted to program development will be a direct function of the revenues producers can expect to earn by supplying programs. Full copyright liability for cable retransmission of distant signals offers market participants the widest possible scope to find the least-cost way of making programming available, whereas the absence of any copyright liability opens the possibility that producers will receive perverse price signals. Unfortunately, the compulsory license is more like a no-copyright regime than it is like a full-copyright regime. The best that can be hoped for from the compulsory license process is that it will approximate what can be accomplished more effectively through market negotiations. In most cases, however, producers' revenues will be lower under the compulsory license than they would be under full copyright liability. Producers' incentives to invest in creating new programs are correspondingly reduced. Hence, fewer resources are devoted to program development now than would be devoted to program development if the cable compulsory license were replaced by full copyright liability.[108]

82. Turning from the impact of the compulsory license on the overall supply of programs to its impact on what kinds of programs are developed and how they are distributed among exhibition media, we begin by noting that differences in the amount of resources devoted to developing particular kinds of programs aimed at particular markets will be a direct function of differences in the revenues producers can expect to earn in these different markets. In order for the market to function well in matching consumers' preferences for programs with producers' ability to supply programs, the intensity of viewers' preferences for different kinds of programs have to be reflected in the revenues producers earn. Full copyright liability provides the necessary link between viewers' preferences and producers' revenues, but the cable compulsory license does not.

83. Several areas in which the cable compulsory license distorts incentives from what they would be under full copyright can be identified.[109] First, program suppliers have an increased incentive to supply programs exclusively to cable. Second, cable systems have an incentive to carry distant signals rather than original programming, which, although more costly to acquire, may also be more highly valued by consumers. Third, cable systems can acquire programming on more favorable terms than other alternatives to broadcasters. Finally, the compulsory license introduces inefficiencies into the advertising market by creating mismatches between viewers and advertisers.

84. Consider first the impact of the compulsory license on non-cable households. We noted earlier that when the compulsory license process fails to reimburse program suppliers fully for the value of their program to viewers, the quality of programming that will be made available will be worse than it would be under full copyright. Thus, the quality of the general fare available to broadcast viewers will be lower under the compulsory license than under full copyright liability. Cable viewers will see some of this loss offset by the expanded viewing opportunities afforded by cable, but non-cable households will be clear losers.

85. Nor are cable viewers necessarily well-served by the compulsory license when it fails to duplicate the outcomes that would be achieved through market negotiations. Many commenters opposed to substituting full copyright for the compulsory license argue as though the costs of market negotiation would be prohibitive and that cable systems would have no alternative but to drop distant signals altogether if it were not for the compulsory license. Implicit in many of these comments is the expectation that this would leave substantial holes in the cable operators' lineup of programs, thereby reducing cable viewers' choices compared to what they are currently. We doubt transactions costs are prohibitive; but even in circumstances where a cable operator might decide that it is too expensive to negotiate to carry a particular program or entire distant signal, it would almost always be in the interest of a cable operator to substitute alternative programming for the dropped programming rather than show a blank screen.[110]

86. As Besen observes, "[A] calculation [of the costs of moving to full copyright] that ignores the fact that cable systems will attempt to replace imported distant signals with other programs will overstate, perhaps by a substantial amount, the effect of eliminating the compulsory license on the value of the service that cable systems can provide to their viewers."[111] Indeed, in some cases, cable operators confronted by market prices will be induced to substitute cable-only programming that cable subscribers value more highly than the dropped distant signal.

87. Suppose, for example, a distant signal has a value of 250 to consumers, generates revenue of 200 to the cable operator, but carries a compulsory license fee of only 100, whereas an alternative cable-only programming source (competing for space on a limited-channel system) has a market value of 325 to consumers, would generate revenues of 250 for the cable operator, and has a cost to the cable operator of 180. Suppose further that the full-copyright market price of the distant signal would be 150. The cable-only channel is more valuable to consumers, but a profit-maximizing cable operator would choose the distant signal under a compulsory license regime and would only choose the cable-only source under a full copyright regime.[112]

88. The same logic applies when the cable system has unused channel capacity.[113] The existence of unused capacity is an indication that the value to viewers of additional channels is less than the cost of acquiring them, which, in turn, is indicative of diminishing returns to adding signals. Under these circumstances, a cable-only service that is not profitable to carry when a distant signal is carried, may well become worth carrying if the distant signal is dropped. As Besen notes:

> Thus, even cable systems with unused capacity can be expected to carry additional cable-only services if they are unable to obtain the rights to carry broadcast signals in free market negotiations. And as in the case of systems with limited channel capacity, this increase in the demand for cable-only program

> services will result in an increase in the resources devoted to the production of programs for such services.[114]

89. Besides its adverse impact on viewers, the compulsory license introduces distortions into the use of television as an advertising medium.[115] The amount of resources devoted to commercial broadcasting and advertiser-supported cable are a function of the advertising value of such programs, but when a distant signal is retransmitted in a given local market, it is illegal under the compulsory license for the cable system to substitute local advertising for the national or distant-market advertising carried on the distant signal. As a result, local advertisers are denied the opportunity to compete for a valuable advertising vehicle and local viewers are forced to watch ads that may be less valuable to them than local ads. Under full copyright, in contrast, the cable operator who has acquired the rights to show a valued program is in a position to offer advertising space to the advertiser who values it most.[116]

90. Finally, all future television viewers are harmed when the compulsory license fails to emulate market negotiations and provides an implicit subsidy to cable vis-a-vis other exhibition outlets like DBS. Although cable may have seemed a fledgling industry in need of a subsidy to realize its full potential in the 1970s, no one can seriously argue that today's cable industry requires any special subsidy to be competitive with other exhibition outlets. Far from encouraging the efficient development of an infant industry, a compulsory license that fails to emulate market transactions encourages cable to develop in areas that might better be served by alternative exhibition outlets. Under full copyright, with all exhibition media competing for programs on the basis of market prices, the distribution of programs across different media will be based on the inherent economic and technological advantages of those different media rather than on any arbitrary advantage achieved through regulation.

91. In summary, the cable compulsory license can do no better than market negotiations under full copyright in guiding the decisions of program producers and exhibitors so as to maximize the value of the programming made available to television viewers; in fact, it is prone to do worse. There is no need to give the cable industry a special subsidy to encourage it to carry distant signals rather than other programs. However, the compulsory license provides just such an incentive, to the detriment of the overall welfare of television viewers.

D. *The Foreclosure Issue*

92. Some commenters express the fear that, without the compulsory license, broadcasters will be able to "foreclose" cable systems from access to broadcast programming. The National Cable Television Association (NCTA) also suggests that Congress was motivated in part by this concern when it passed the compulsory license. In its comments, NCTA states that "[C]ongress was also apprised of the very real possibility that copyright holders would use their market control to exact exorbitant royalty fees or deny retransmission rights altogether."[117] We cannot guarantee that in every case programmers will grant cable retransmission rights. However, there is vigorous competition among program suppliers.[118] It is therefore unlikely that the overall supply of programming to cable could be limited in any significant way by witholding of product. The proliferation of cable networks also supports the proposition that foreclosure would be a fruitless strategy.

93. The key proposition with respect to foreclosure is that it is highly unlikely to occur given the structure of the video program delivery market today. The question of whether foreclosure was a real threat in 1976 is of limited significance in 1988. Nevertheless, those who assert that foreclosure was an important Congressional concern in 1976 offer little supporting evidence.[119] NCTA cites testimony by two cable industry officials. In 1975 testimony, the then-Chairman of NCTA indicated that cable wished "to avoid the possibility of having an unknown (royalty payment) amount established without a real control by us."[120] In arguing against setting the royalty payments via the market, he went on to suggest that there were, in essence, no substitutes for broadcast signals. However, this testimony did not explore the implications of the presence of large numbers of broadcast signals in most parts of the country. Nor did it consider the enormous desire of broadcasters for must carry protection. These factors strongly suggest that local broadcasters would be eagerly seeking and competing for cable carriage in a full copyright world, not exercising "market control" to deny retransmission consent. The relative abundance of local signals in most parts of the country, and the proliferation of cable networks suggest that at least some distant signals would behave similarly.

94. NCTA's other source is 1973 testimony by the general counsel of the Pennsylvania Cable Television Association. He describes some discussions that he and other cable officials had with representatives of the motion picture industry in which the latter argued for royalty rates substantially higher than those that cable interests wished to pay. His conclusion was that "fair, realistic, and responsible dealing with the copyright owners had been and is an utter impossibility."[121]

95. Although there is nothing in the House Report on the 1976 Copyright Act to suggest that Congress feared foreclosure or the exercise of market power by the broadcasters to extract excessive rates from cable operators, at least one independent commentator, looking back on the Congressional deliberation, has opined that the legislators *were* in fact concerned about foreclosure. During 1981 House subcommittee hearings on copyright and cable television, Bernard Wunder, the then-administrator of NTIA offered the following observations.

> The compulsory licensing feature that is central to the 1976 Copyright Act was adopted because its proponents had successfully argued two key points. First, they argued--and Congress accepted the argument--that cable's relative weakness in a programming market allegedly dominated by big television networks, big television stations, and big television program producers meant that, forced to bargain, cable television would lose out. In other words, they successfully argued that Government intervention to serve as an "equalizer" was necessary to make the programming market work for cable, and ultimately, for cable television subscribers.[122]

The NTIA administrator goes on to discuss the transactions costs rationale as well, and then suggests that, at least with respect to the "larger MSO-affiliated cable systems," there is no need for an "equalizer." He then concluded

that "the number of cable systems and interests that require such extraordinary Government assistance today is probably limited.[123]

96. The proliferation of cable networks since 1976, and indeed since 1981, when the above testimony was offered, has clearly reduced the importance of broadcast programming, particularly distant signals, as a source of material for cable television systems. An analysis of cable system statements of account filed with the Copyright Office shows that in July of 1986, the average "Form 3" cable system carried 3.381 distant signals. The comparable figure for July of 1980 is 3.768 distant signals.[124] Thus, the share of cable channels accounted for by distant broadcast signals has fallen. Cable networks are probably poorer substitutes for local than for distant broadcast signals. However, the broadcasters' continuing struggle for must carry protection belies the notion that local broadcasters might withhold programming from cable. Today, 53.8 percent of television households subscribe to cable.[125] In many cases, cable extends the reach of local broadcast signals or improves the reception available to households with off-air service. These factors lay to rest the fear that without the compulsory license broadcasters might withold programming from cable.

97. Those commenters who believe that, in the event that the compulsory license is repealed, cable operators will be foreclosed from access to programming offer little in support of that assertion. Some commenters, such as Cole, Raywid, and Braverman, simply assert that "[I]f the compulsory license were eliminated, distant television signals, and presumably local signals as well, would be withdrawn from more than 40 million cable television households throughout the United States."[126] NCTA and Turner Broadcasting System, Inc. (Turner) attempt to illustrate this claim with reference to sports programming, baseball in particular.

98. Turner claims that "compulsory licensing has enabled viewers in the 36 states without a local baseball team to receive the Atlanta Braves, carried on WTBS."[127] NCTA refers to the attempts of Doubleday Sports, Inc., the owners of the New York Mets baseball team, to impose copyright liability on Eastern Microwave, Inc., the satellite uplinker of WOR, the New York area television station with broadcast rights to the Mets games.[128] In that case, the U.S. Court of Appeals ruled that Eastern Microwave was covered by the "passive carrier" exemption in Section 111 (a) (3) of the Copyright Act.[129] The Court found that imposition of copyright liability on satellite carriers would "frustrate the congressional intent reflected in the [Copyright] Act by denying CATV systems the opportunity to participate in the compulsory licensing program."

99. It is certainly true that the major league sports place, or try to place some limitations on the distribution of television coverage of their games. They generally do this on a regional basis, choosing to reduce competition for attention (*i.e.*, attendance at games or viewing or listening to local broadcasts) to local games from imported broadcasts of distant games. In the days before satellite relays of broadcast signals became commonplace, they limited distribution via broadcast signals. Now, as more and more teams resort to satellite-delivered regional cable networks for local distribution of their games, baseball limits geographically the distribution of those networks.[130] It is likely that Doubleday Sports, Inc. filed its suit in an attempt to maintain control of the distribution of Mets games, so that it could limit "spillovers" of its games into the territories of other teams. There is no reason to assume that the goal was to limit access *per se*. Indeed, it is likely that Doubleday would have been quite willing to extend service to additional households not in other teams' territories if it had been practical to do so and receive compensation for it.

100. Currently, 20 of the 26 MLB teams have contracts for the distribution of some of their games via cable.[131] The arrangements include basic, premium, and pay per view services. The other six teams have local television contracts. At least some of the regional services have scrambled their satellite signals. Regional networks are permitted to market their signals in distant areas without local baseball teams (*e.g.*, Florida). If one is opposed to limitations of this nature, then it appears that the appropriate thing to do is to object to major league sports' antitrust exemption. However, the larger point is that sports programming, while very popular and important, is a special case. It is simply invalid to project the distribution practices of the sports leagues to other types of programming.

101. Furthermore, while in the absence of the compulsory license, there would undoubtedly be changes in the manner in which sports programming is distributed, it seems clear that such programming will continue to be widely available. In the case of baseball, as noted above, there is a trend to exhibition via regional pay networks delivered via scrambled satellite signal. Their geographic availability will be unaffected by changes in the compulsory license. Moreover, ESPN recently acquired the rights to carry approximately 175 baseball games each year. ESPN's contract with Major League Baseball covers the years 1990-93.[132]

102. This does not mean, of course, that baseball is unconcerned about geographic limitations on exhibition of games. Particularly in view of the Eastern Microwave case, we must take seriously the assertion by Turner Broadcasting that "baseball will not likely grant cable retransmission rights to a broadcast station."[133] However, just as the regional pay networks are permitted to sell their services in distant areas without local teams, it is possible that local broadcast stations might acquire cable retransmission rights for certain parts of the country.

103. With respect to other sports, press reports suggest that Turner's NBA contract allows for the transfer of coverage from WTBS to a cable service.[134] Furthermore, the NBA and the National Hockey League filed comments in this proceeding indicating their desire to license cable carriage of their games.[135] ESPN (a 24 hour sports network) carries a substantial amount of college sports, in addition to its extensive professional sports schedule. It recently signed a contract to carry a major post-season college football game--the Gator Bowl.[136] ESPN also will carry four other "bowl" games, some Ivy League football, and 27 College Football Association games next year.

104. The cable retransmission issue has not been particularly important with respect to the National Football League (NFL). With the exception of the recent contract for ESPN to carry some games, NFL games have been exhibited via network affiliates. Until recently there have been no network affiliates distributed by satellite carriers. The advent of "network superstations" has apparently been driven by the demand of the home satellite dish market rather than the cable market.[137] However, the

demand by cable systems for network superstations appears to be quite small at this point. This is probably due to the fact that most cable systems have access off-air or via microwave to local affiliates of the three major commercial networks. This, plus the network non-duplication rules, combine to limit cable system demand for these network superstations, given the abundance of non-broadcast programming available. (Under some circumstances, cable systems can carry broadcast stations on a less-than-fulltime basis; so conceivably they could "cherry pick" alternative NFL games.) Also, a very large amount of NFL programming is available across the country. CBS and NBC each normally offer two games every Sunday and ABC offers one every Monday. ESPN offers some Sunday night games. Every area generally gets at least three of the four games offered by CBS and NBC.

105. In summary, the market for program production is quite competitive, so it is unlikely that any producer could significantly affect the supply of programming to cable by withholding his properties from it. There appears to be no incentive for producers to do so.[138] This conclusion is underlined by the proliferation of cable networks. The only specific examples of alleged foreclosure proffered by commenters in this proceeding involve professional baseball. The limitations on exhibition of baseball games appear to stem from the antitrust exemption for baseball and not to be representative of other categories of programming. Furthermore, there is an immense amount of sports programming in general and baseball programming in particular exhibited over cable by cable networks other than superstations. This suggests that sports interests are ready, willing, and able to sell cable television rights to substantial amounts of sporting events.

E. *Is Copyright Protection Too Generous* ?

106. The Constitutional language in which copyright law is rooted authorizes the Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." This language, although very general, indicates that the limited exclusive rights embodied in a copyright were viewed as the preferred instrument for encouraging the production of valued works, but that the promotion of creative activities rather than the rewarding of inventors was the primary social objective to be achieved. In other words, the language of the Constitution recognizes both a need to provide exclusivity in order to encourage the supply of valued works and a need to limit the terms of that exclusivity in order that works once produced be distributed as efficiently as possible.

107. Commenters in this proceeding who advocate repeal of the cable compulsory license in favor of full copyright liability generally emphasize the aspect of copyright that grants copyright holders the right to capture the full value of the works whose copyright they own; whereas, those advocating retention of the compulsory license emphasize the need to accommodate the interest of the viewing public in having valued works receive as widespread distribution as possible. In fact, of course, there is merit in each of these views, but neither gives a proper sense of the inherent conflict between these two objectives and the need in designing copyright arrangements to balance the interest of the public in having good incentives for program producers to supply valued works against the interest of the public in having the works that are supplied distributed in the most efficient way possible.

108. Copyright protection is not an all or nothing proposition, and the extent to which the owner of a copyright can extract economic value from the copyright will vary according to the number of years for which the copyright is valid, the particular uses of the work for which the copyright is valid, and the type of compensation to which the owner of the copyright is entitled. There is no copyright liability, for example, when an individual tapes a program off the air for his or her own use. There is full copyright liability, in contrast, when a broadcaster shows a program; and the owner of the program is free to set the terms under which the program can be shown. The compulsory license represents an intermediate arrangement under which the owner of the copyright is entitled to compensation but is not free to set the terms under which the program can be shown and must accept whatever compensation is forthcoming from the administrative process that determines the distribution of compulsory license fees.

109. Neither the courts nor the Congress have questioned the underlying principle that copyright holders should be compensated and that the preferred method of compensation is the granting of exclusive rights for the life of the copyright. Furthermore, as we have already argued at length, the compulsory license introduces distortions into the video marketplace that make viewers worse off than they would be under full copyright. Implicit in this argument, however, is an acceptance of current copyright terms (generally, life of the author plus 50 years) as appropriate. It remains to discuss the argument of those opposed to replacing the compulsory license with full copyright liability that the compulsory license strikes a better balance than would be struck under full copyright between the interest of viewers in having existing programs more widely available and the interest of viewers in promoting the supply of new programs. This report does not presume to provide a comprehensive analysis of optimal copyright arrangements. However, the following general observations suggest that, in fact, these interests are better balanced under full copyright liability.

110. First, if the objective of copyright arrangements is to maximize consumer welfare, authors are entitled to the bare minimum compensation that will induce them to create new works valued by consumers. Ideally, such compensation should come in a form that allows the program to be exhibited in a way that maximizes consumer welfare right from the start. Any compensation scheme that pays the author more than the minimum necessary to produce the work transfers income from viewers to the author and encourages program owners to restrict distribution of their programs in ways that lower consumer welfare.

111. Excessively generous copyright protection lowers consumer welfare, but so too does inadequate copyright protection. The complete elimination of copyright protection, for example, would allow people to enjoy an author's work without paying anything for it, severely reducing the amount of work that would be forthcoming unless an alternative method of compensation is developed to provide authors with sufficient remuneration so that they have an incentive to develop new works. Without an alternative compensation scheme, too few valued works will be produced. Such a compensation scheme

might, for example, provide direct government subsidies to authors on the condition that any works produced be placed in the public domain. There are, however, numerous difficulties with such a subsidy scheme, and the remainder of this discussion is based on the premise that the copyright framework provides the best mechanism for encouraging program development.

112. Viewed in the context of achieving a proper balance between incentives to develop new programs and incentives to distribute existing programs efficiently, compulsory license arrangements should be adopted only if there is reason to believe that full copyright provides "excessive" market power in the sense that the value to consumers of programs that are produced under full copyright but that would not be produced under the compulsory license is less than the gain to consumers from a wider distribution of the programs that would continue to be produced under the compulsory license. There are, however, two important reasons to doubt that the cable compulsory license makes such a contribution to consumer welfare.

113. First, there is sufficient competition among program suppliers that most are severely constrained in their ability to limit distribution of their programs in order to earn excess profits. Any producer with an "average" program who offers his program on terms that are substantially more restrictive or expensive than other "average" programs will have difficulty finding a buyer.[139] This is not to deny that there will be some programs that turn out to be sufficiently attractive to viewers that their value greatly exceeds their production cost; but unless this is the case for most programs, such highly profitable programs should be viewed as analogous to the "gushers" that offset the "dry holes" when drilling for oil. Thus, if the terms of full copyright are set properly, competition in the program supply industry will ensure that program suppliers earn only normal competitive profits even under full copyright, in which case the compulsory license offers no advantages compared to full copyright and all the disadvantages discussed in this report.

114. Second, there is little in the legislative history of the 1976 Copyright Act or the record developed in this proceeding to suggest that the purpose of the cable compulsory license was to reduce the compensation afforded to producers below what it would be under full copyright, but even if the terms of full copyright are judged to be too generous, the cable compulsory license is not an appropriate remedy. Although it might partially offset some of the consumer welfare losses from generous copyright protection, the cable compulsory license introduces counterbalancing distortions into the program acquisition market that lower consumer welfare.

115. The most direct way to strike a different balance between the incentives to produce and the incentives to distribute existing programs more efficiently would be to change the life of the copyright. It might also make sense to provide for a limited term of full copyright followed by compulsory licensing for all exhibitors. However, it does not appear that singling out one type of programming in one distribution outlet for separate treatment under a compulsory license is, given current institutional arrangements in program distribution, an efficient method of adjusting the balance between these incentives. We therefore believe that the question of whether there should be a compulsory license for programs acquired via distant signal should be decided based on an analysis of whether the transactions costs of market negotiations are large enough to outweigh the economic efficiency costs of the compulsory license.

IV. The Practicality of Full Copyright Liability

Introduction

116. The previous section discussed the consumer welfare benefits of eliminating the compulsory license. In this section, we consider whether the compulsory license can be replaced by full copyright liability with a manageable level of transactions costs. In a full copyright liability regime, copyright holders, broadcasters, and cable operators would be free to negotiate a variety of mechanisms for cable retransmission of broadcast signals. Commenters suggest several specific possibilities, which we review below. Individual negotiations by every cable system with the owners of every program retransmitted by the system, the scenario mentioned in the House *Report* on the Copyright Act of 1976, is one of them. In our judgment, however, a "networking" approach is the most likely. Broadcast stations now widely carried as distant signals, on a national or regional basis, would become "retransmission rights packagers" (a function analogous to that performed by networks), acquiring national or regional cable retransmission rights for their programming, and marketing their channels to cable systems, acting in the role of "affiliates."

117. Important developments in the 12 years since the compulsory license was adopted suggest the practicality of alternative arrangements. Today, dozens of full copyright cable networks are flourishing. Furthermore, the incidence of multiple cable system ownership has increased, which suggests that transactions costs, on a per subscriber basis, are lower than before.[140] The presence of a multitude of cable networks demonstrates that entrepreneurs are ready, willing, and able to assemble programming on a full copyright basis for the cable industry. It suggests that, with the proper incentives, entrepreneurs would come forward to acquire cable retransmission rights for programming on television broadcast stations. If transactions costs (*i.e.*, the costs that cable systems would incur to acquire retransmission rights to broadcast programming under full copyright liability) are, in fact, moderate in magnitude, then a crucial justification for the compulsory license is not now valid. While the cable network analogy is less precise in the case of local signals, we believe that local stations could and likely would step into the role of retransmision rights packager, with cable systems in their local service areas akin to their affiliates.

118. In the next subsection, we review and analyze the alternatives to the compulsory license proposed by commenters, as well as the arguments of those who advocate retaining it. We also discuss a few proposals to modify the compulsory license. In the following subsection, we consider in some detail the manner in which broadcast stations might operate as retransmission rights packagers. This subsection also discusses the one quantitative estimate of which we are aware of the transactions costs that a superstation would incur in acquiring cable retransmission rights to its programming. The final subsection includes a brief description of transactions costs under the current regime.

The Compulsory License and Market Alternatives

119. Commenters were fairly evenly divided on the subject of the compulsory license, with 17 in favor of retaining it, 12 in favor of eliminating it, and two expressing no opinion.[141] Proponents of the compulsory license stress two main arguments. First, they argue that Congress' 1976 conclusion regarding the high transactions costs of full copyright liability remains valid.[142] Second, they argue that, since the broadcasting and program production industries are thriving, there is no need for a departure from an established system.[143]

120. With respect to transactions costs, defenders of the compulsory license generally repeat the 1976 *House Report* statement that requiring every cable system to negotiate with every copyright owner for retransmission rights would be unduly burdensome.[144] NCTA goes on to assert that "it would be difficult for a cable operator to know in advance on a daily basis what particular programs are being aired in order to ascertain whether he has the appropriate clearances or must black out the programs" (citation omitted).[145] Commenters opposing elimination of the compulsory license also generally assert that market arrangements would not develop and, in many cases, forecast that cable retransmission of distant, and even local, broadcast signals would end.[146]

121. A few commenters suggested modifications in the compulsory license that, in their view, would improve it. Some advise that the system should be retained, but that the royalty rates should be increased.[147] One suggests reducing the distant signal royalty rate to zero.[148] In a somewhat similar vein, Geller and Lampert suggest that the Commission withdraw distant signal authorization for the top 100 markets, noting that "the compulsory license is available only for the ' . . . carriage of signals permissible under to rules, regulations, or authorizations of the Federal Communications Commission.[149]

122. MLB proffers four suggestions for improving the operations of the compulsory license.[150] They are: 1) simplify it to reduce transactions costs (although no specific measures to effect simplification are mentioned); 2) overturn the *Cablevision* case;[151] 3) speed up the distribution of royalties (again, no specific measures are proposed, but this point appears to overlap with the first one); and 4) refrain from extending the compulsory license to new media.[152]

123. The U.S. Copyright Office also has some suggested improvements.[153] It advocates changing the royalty formula to one based on a flat charge per cable subscriber. Also, it suggests that any future changes in Commission rules that might affect royalty payments should be made effective as of the first day of a compulsory license royalty payment accounting period. In addition, it requests that the Commission improve its liaison with the Copyright Office on matters relating to interpretation of present and former Commission rules.

124. *Market Alternatives.* The range of alternatives proposed by commenters recommending elimination of the compulsory license is spanned in the comments of the National Telecommunications and Information Administration (NTIA).[154] NTIA outlines four "possible mechanisms by which suppliers could convey performance rights to cable operators."[155]The proposals of other commenters, while worded differently, correspond to one or more of the NTIA scenarios. The four NTIA options are: 1) direct negotiations between cable systems and copyright holders for cable retransmission rights; 2) the "networking" option; 3) blanket licensing; and 4) a negotiated license, such as the Copyright Act provides for noncommercial broadcast rights.

125. Under the first option, cable operators would assemble packages of broadcast programming to retransmit by negotiating with individual copyright holders. In essence, this is the regime that Congress branded "impractical and unduly burdensome." The main advantage of this "*a la carte*" approach, in NTIA's view, is that license fees accurately reflect the market value of each program, providing good information about consumer preferences for each. The main disadvantage is high transaction costs, although NTIA notes that a clearinghouse with information on ownership of program rights and, perhaps, licensing terms, could facilitate the acquisition of retransmission rights. ABC also notes the possibility that "a third party broker similar to Viacom" could arise to serve as an intermediary between cable operators and program suppliers.[156]

126. MPAA also advances this suggestion, noting that cable operators might "negotiate directly in competition with broadcasters for performance rights to programs."[157] MPAA cites examples of this phenomenon from the trade press, and, in its comments in the syndicated exclusivity proceeding, describes several cable channels that have been created using this mechanism. One of the descriptions in the trade press refers to regional cable channels "carrying syndicated and original programming and sometimes resembling independent television stations."[158]

127. NTIA's second mechanism is, in essence, the networking option--broadcast stations buy cable retransmission rights along with the broadcast exhibition rights that they normally acquire.[159] Under this regime, NTIA points out, stations could license cable retransmission either of their entire program day or of specific dayparts. The major advantage is relatively low transaction costs, since "[B]roadcasters currently purchase broadcast exhibition rights and need only add cable retransmission rights to their lists of negotiated items."

128. NTIA sees a problem with such an arrangement, however, raising the possibility that "this mechanism could expose broadcasters to a considerable amount of financial risk." The risk is apparently that broadcasters might make inaccurate estimates of the value cable operators place on programs, and end up agreeing to pay more for cable retransmission rights than they could recoup in fees from cable systems.

129. Two of the "marketplace models" advanced by MPAA are networking arrangements for the acquisition of cable retransmission rights.[160] First, MPAA asserts that cable operators could acquire cable retransmission rights directly from distant signal broadcasters, in cases where the broadcaster has those rights. Second, MPAA suggests that willing superstations could become networks. They could either acquire cable retransmission rights *in addition to* local broadcast rights to their programming, or "simply make the transition from broadcaster to cable network." The two options are quite similar. It appears that the difference is that, in the first case, MPAA is referring to less than a full schedule of programming, perhaps only to that produced by the station (for which the broadcaster would normally hold the copyright).

130. These proposals are echoed by ABC with slightly different terminology.[161] ABC asserts that, under full copyright liability, superstations, either national or regional, would need to decide whether or not to embrace

that status. With respect to "willing" national superstations, ABC suggests that they "would formally bargain for national cable transmission rights for all of their programming, as their nonbroadcast competitors have done for years." "Willing" regional superstations "could simply add one additional item to the agenda in bargaining with program owners: the right to authorize regional transmissions via cable." While asserting the practicality of this arrangement, ABC notes that "the transaction cost problems of delivering regional superstation signals to cable systems through a free market device may be more complex than those presented by national superstations." ABC points out that in either case, the superstation would be entitled to charge a fee to cable systems for the right to retransmit its signal.

131. No opponents of eliminating the compulsory license critique the "networking" option or, indeed, the individual negotiation option, in more than cursory terms. In its reply comments, NCTA claims that "insurmountable practical barriers to the carriage of broadcast signals (particularly local and regional signals) are presented by the need to obtain station-by-station, program-by-program clearances and the gaps that will result from the denial of such clearances."[162] This statement ignores the possibility that broadcast stations might serve a regional or national networking function, and *assumes* without corroborating analysis that cable operators would have to keep track of individual program clearance rights on a daily basis.[163] NCTA does, however, concede that "purchasing agents" may emerge to exploit the economies of scale present in cable carriage of national 'superstations,' while asserting that "it is unlikely that such mechanisms would develop for the carriage of regional distant signals."[164]

132. Blanket licensing is the third mechanism proffered by NTIA. As do the other commenters that mention this, NTIA refers to blanket licensing agencies that handle performance rights to music, such as ASCAP and BMI. With blanket licensing for cable retransmission, one or more associations of copyright holders, such as the MPAA and/or sports interests (*e.g.*, Major League Baseball), would grant blanket licenses to cable operators for retransmission of some or all of the broadcast programming to which the associations had rights.

133. Comments submitted by the three major music performing rights societies, the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc. also support this option.[165] These groups now participate in CRT distribution proceedings as the "Music Claimants" group. They suggest that, since they are authorized to grant rights to essentially all copyrighted music, cable systems could acquire needed music rights under full copyright liability at low transactions costs. They also suggest that "the collective licensing we undertake serves as a model for other types of copyrighted works. We would expect such collective licensing mechanisms to develop with the abolition of the compulsory license."[166] ABC also suggests that a performing rights society, similar to ASCAP and BMI, might develop.[167]

134. A blanket licensing approach for broadcast retransmissions would likely require some sort of antitrust law exemption to allow the rights holders to establish license fees and to divide the royalties among their members. ASCAP and BMI currently operate under consent decrees.[168] Moreover, the Copyright Act now confers exemptions from the antitrust laws on claimants before the CRT, in order to allow them to negotiate proposed divisions of royalties that are then presented to the CRT.[169]

135. NTIA sees low transactions costs as the strength of this mechanism. The weakness, in NTIA's view, is that it would not encourage competition among program producers. A few commenters refer to the protracted litigation in which ASCAP and BMI have been involved, claiming that it shows the impracticality of performing rights societies. Time, Inc. refers to "continuing antitrust actions challenging the legality of the blanket licenses the organizations issue."[170] Turner Broadcasting System, Inc. (Turner) notes that the ASCAP consent decree contains a mechanism for judicial determination of "reasonable fees' in the event of controversies between ASCAP and its licensees. Turner then asserts that this "judicial mechanism" has been needed frequently.[171] ASCAP, BMI, and SESAC respond to these points by noting that the challenges to the blanket license have all been rejected and that, the relevant court has never had to determine reasonable fees after trial (although the voluntary agreements reached between ASCAP et al. and licensees have often been reached with judicial assistance).[172]

136. NTIA, while stating its preference for a cable retransmission rights regime that is private, proffers as its fourth option a "second best alternative." This is a negotiated license such as the Copyright Act provides for noncommercial broadcast rights.[173] The Act requires copyright owners and public broadcasting entities to "negotiate in good faith and cooperate fully with the Tribunal in an effort to reach reasonable and expeditious results." Only if they do not do so does the CRT step in and set rates and the division of royalties. The Act grants the relevant parties an exemption from the antitrust laws for this purpose.

137. This proposal is actually somewhat similar to the current regime. Copyright claimants are now entitled to bargain among themselves over the division of royalties. They have an antitrust exemption for that purpose, and the CRT is required to distribute the royalties (after deducting its reasonable administrative costs) according to the claimants' agreement, provided that there is not a "controversy" over the division.[174] The difference is that in the public broadcasting case, the rate levels are also subject to negotiation, while for cable retransmission the levels are set by the CRT according to procedures laid down in the statute.

138. The only explicit ranking of alternative regimes (other than NTIA's statement that a negotiated license is not the first choice) is made by Besen, in a statement submitted by MPAA. After analyzing alternative program distribution techniques under full copyright liability and noting the economic incentives to hold down transaction costs in that setting, he comes to the following conclusion:

> [T]here are several ways in which such transactions costs could be limited in the case of cable television, but one seems especially likely: broadcast stations that wished to engage in the business of exporting their signals to cable systems would enter the "network" business. (footnote omitted)[175]

Besen also illustrates the manner in which networking reduces the number of transactions that program suppliers and broadcast stations (or other types of affiliates that

exhibit programming) must undertake. In his example, there are 200 broadcast stations with 150 television programs on their weekly schedule. If each station negotiates with each program supplier, a total of 30,000 (200 x 150) transactions are required. However, if the 200 stations affiliate with a network, the number of transactions is reduced to 350 (200 + 150), since each station and each program supplier negotiates once with the network.[176] Similarly, a local broadcast station acting as an intermediary between program suppliers and cable systems (the functional equivalent of "affiliates" of the local broadcast station) could reduce the number of transactions that would be needed for the cable systems to acquire retransmission rights to programming carried by the broadcast station.

139. *Analysis of Market Alternatives*. Our analysis of the alternatives leads us to conclude, as did Besen, that, with full copyright liability, broadcast stations will likely function as networks, acquiring cable retransmission rights to some or all of their programming, and marketing those rights to cable system affiliates. We believe that this method is efficient and practical. However, with full copyright liability, other options are possible and may co-exist with networking. In particular, it is probable that there will continue to be instances of direct acquisition of retransmission rights by cable systems from copyright owners.

140. The ability to reduce transactions costs is a key characteristic of a network. Existing networks negotiate carriage agreements with a group of affiliates, which may be broadcast stations, cable systems, MMDS or SMATV operators, or some combination of these outlets. The network offers a package of programming for which it has negotiated exhibition rights with program producers and copyright holders. Thus, it is unnecessary for each affiliate to negotiate with each copyright holder. On the other hand, since a separate agreement may be made between network and copyright holder for each program, it remains possible for producers to be compensated according to the value that consumers place on each program. The information transmission and incentive provision characteristics of a market process are preserved.[177] This mechanism could be employed by local broadcast stations, as well as those retransmitted nationally or regionally.

141. NTIA raised the possibility that broadcasters who entered into the network business might face significant financial risk. The risk derives from the possibility that broadcasters might overestimate the value cable operators place on broadcast programming. This could lead them to pay excessive fees for cable retransmission rights, and to lose money on their networking business. This fear is, in our view, exaggerated. We think it likely that, in the absence of the compulsory license, information on cable operator valuation of broadcast signals would develop rapidly, based in part on audience data for currently-carried signals. Furthermore, cable retransmission rights contracts could easily be written in terms of a percentage of the revenues realized by the broadcast station from cable retransmission. This would minimize the "financial risk" referred to by NTIA, should broadcasters wish to do so.

142. Some programming may also be offered under a blanket license. NTIA suggests that blanket licensing does not encourage competition among suppliers of programming. We believe that NTIA is too pessimistic on this count. While it is certainly true that the opportunity to be compensated directly and individually spurs competition among producers, NTIA may underestimate the ability of a blanket licensing system to reward producers in proportion to the value of their product.

143. Distribution of royalties under a blanket license would likely be based on monitoring of the use of programming, with popular shows getting bigger returns. Furthermore, at least in principle it is possible for more than one performing rights association to coexist (*e.g.*, ASCAP and BMI). Since dissatisfied producers could form or threaten to form their own association, or even to license on an individual basis (as is done with certain music rights), there would be continuing pressure on blanket licensing agencies to make their royalty distributions reflect the relative values of individual programs. While blanket licensing compensation is unlikely to do so as well as a full-blown market process would, the failure to relate compensation to relative valuation with reasonable precision could lead to the disintegration of the association. In making the decision to join or not to join a particular performing rights organization, rights holders can explicitly trade off the presumed transactions cost savings of the blanket license against possible reduced compensation. Other things equal, the blanket license would be more attractive for low-valued programming, where transactions costs account for a relatively high fraction of compensation.

144. Thus, while the blanket license has some similarities to the compulsory license, there are two important difference between it and a blanket license imposed via market process. First, under the compulsory license, the government sets the level of fees. Second, a market process leaves copyright holders with the *option* of joining a performing rights organization and participating in the blanket license.

145. As our conclusion that the compulsory license should be eliminated implies, we do not see adjustments in the royalty rates up or down, whether by the CRT or the Congress, as an adequate solution. As noted in Section II, the CRT is severely limited in its authority to adjust the basic rates that account for the bulk of cable television royalty payments. Moreover, it is difficult to see how legislated changes in the rates would allow the flexibility to respond to changes in the marketplace that we believe is needed if consumers are to have as diverse and bountiful menu of programming as possible. On the other hand, we believe that Geller and Lampert's suggestion to ban distant signal importation in the top 100 markets goes too far. It would, in all likelihood, reduce the options available to consumers in those markets below what they would have in a full copyright liability environment. Thus, we decline to accept this recommendation.

Networking As A Mechanism for Marketing Cable Retransmission Rights

146. We turn now to a more detailed discussion of how the networking process might work in a full copyright liability environment. Of necessity, this involves an element of informed speculation. This is because while the compulsory license remains in effect, the incentives for the institutions described to develop are generally not present. Nevertheless, the operations of numerous full copyright cable networks, and the initial reactions of some "superstations" to our new syndicated exclusivity rules provide some relevant "real world" analogies for this task.

147. For purposes of exposition, our discussion is divided into three parts. National distant signals, regional distant signals, and local signals are addressed separately. The statute spells out the difference between local and distant signals for copyright purposes.[178] Congress determined that cable retransmission had a different effect on distant and local signals. This determination led Congress to make the compulsory license for local signals essentially royalty free.[179] Furthermore, the compulsory license for local signals was related, in a policy sense, to the Commission's former must carry rules. There is some sentiment in Congress and elsewhere to reimpose some sort of must carry rules. Additionally, many commenters stress the local compulsory license-must carry nexus. For these reasons, it is advisable to treat the local compulsory license separately.

148. There is no precise criterion for distinguishing regional and national distant signals, or "superstations." Roughly speaking, national superstations are those that are delivered by satellite and marketed throughout the country. Regional superstations are generally delivered by microwave to cable systems in the same general part of the country. From a policy point of view, the major distinction appears to be that for regional superstations the local programming is of some interest to cable viewers outside the local market. For example, local news and public affairs programming produced by a big city television station could well be of interest to regional viewers outside of the station's broadcast service area. These characteristics may lead to differences in the type of networking arrangements that national and regional superstations develop.

149. *National Superstations*. National superstations are aimed at a national audience. In other words, they do not, as a rule, run programming of interest solely or primarily to viewers in one region of the country. In a full copyright liability regime, we believe that such stations would find it efficient to purchase national rights to their programming and sell national advertising. In 1976, the practicality of such arrangements may have been in doubt. There were only two satellite-delivered services--the predecessor of WTBS and Home Box Office. But today there are many nationally-distributed cable networks,[180] showing that the transactions costs of such a regime are not insurmountable.

150. The presence of full copyright cable networks is the strongest piece of evidence supporting the conclusion that some broadcast stations could evolve into networks serving cable system affiliates. However, this conclusion is reinforced by certain actions already taken or announced by some national superstations. In fact, WTBS--the premiere national superstation--is apparently already in the process of becoming a cable network. A trade publication quotes Ted Turner as saying that "no matter what [the] FCC does, WTBS will continue, changing gradually from superstation to cable network."[181]

151. The reported reactions of Turner Broadcasting and Tribune Broadcasting to the Commission's new syndicated exclusivity rules also suggest that national superstations will find it quite possible to acquire national rights, exclusive or non-exclusive, to their programming. One fear that some parties expressed during the syndicated exclusivity rule making was that cable subscribers (and home dish owners) would lose superstation service. The scenario was that the exercise of syndicated exclusivity rights by local broadcast stations would result in large chunks of superstations' programming being "blacked out." The alleged costs and problems associated with doing this and replacing the deleted programming with alternative material would cause many cable systems to drop superstations. When superstation subscribership sank below a critical mass, it would no longer be economical to keep them on the satellite.

152. A senior official of Turner Broadcasting, commenting on the syndicated exclusivity rules, is quoted as saying that "WTBS will take the new rules in stride if it has to," and that the station "will not lose cable affiliates or cable homes because it will not schedule programming susceptible to being blacked out."[182] A similar determination is reflected in a trade press account of an interview with a senior official of Tribune Broadcasting:

> Tribune will do whatever it has to do to keep WGN-TV and three of its other stations (WPIX[TV] New York, KTLA[TV] Los Angeles and KWGN-TV Denver) on the satellite. The out-of-market coverage is critical to the barter programming the stations air and in which Tribune has an interest, he said. Tribune may sue, or it may decide to fill out its schedule with nonexclusive national programming and live with the rules, he said.[183]

While less upbeat than Turner, Tribune apparently believes that it can program its stations with material for which it has national rights.[184] Moreover, United Video, the satellite carrier of WGN, has contingency plans "to put programming on a second satellite for any holes in WGN's schedule," that might be caused by the failure of WGN to secure national rights to some of its programming.[185] WGN-TV is the second most popular superstation.

153. We know of only one attempt to estimate the costs and revenues that a full copyright "superstation" could expect to incur. The estimate appears in a 1981 report of the NTIA.[186] The approach is "to examine the cable households and viewing shares of an independent station on distant cable systems, and regard the distant cable households as though they composed the over-the-air market of an independent station." The NTIA analysis considers the costs of acquiring programming and satellite transmission capacity and the additional revenues that cable systems would earn from an extra distant signal under full copyright liability. The latter includes both advertising revenues and revenues from additional subscribers attracted by the extra signal. The conclusion is that a "network" run by or for cable systems to provide a distant broadcast signal (or its full copyright equivalent) is economically feasible. In the course of the calculations, it is suggested that copyright holders' compensation would be 50 percent higher than that under the compulsory license, based on 1979 rates, and 30 percent higher based on the inflation-adjusted 1980 rates.

154. The analysis is derived from an examination of the 1979 schedule of WOR-TV, deemed a typical superstation. It yields an upper bound transactions cost estimate of $0.10 per subscriber per *year*, or less than a penny per month, based on the approximately two million distant cable subscribers reached by WOR-TV in 1979. While the total transactions costs have doubtless risen over the last nine years, so has the number of distant cable subscribers to WOR and other superstations (not to mention the

growing number of home satellite dish subscribers). WOR-TV now has approximately 12.5 million distant cable subscribers.[187]

155. The foregoing does not allow us to estimate precisely the transactions costs of assembling the programming for a full copyright "superstation." Nor can we know what level of transactions cost per subscriber is supportable in the marketplace. Nevertheless, the transactions cost estimates, coupled with information about current levels of distant signal cable subscribership,[188] suggest that the transactions cost burden is quite manageable.

156. From a public policy point of view, it is irrelevant whether viewers receive national programming (such as movies and first run or off network entertainment series) via a national superstation or a regional one. Thus, as long as entry into or evolution into cable networking is relatively easy, then we can rely on market forces to provide a satisfactory menu of national programming.[189]

157. *Regional Superstations*. With full copyright liability, regional superstations may survive as such, may die out, or may evolve. In such a regime, regional superstations would certainly be free to negotiate for regional cable retransmission rights with copyright owners. To the extent that "regional" connotes relatively limited cable retransmission, however, the reward might not be sufficient, particularly given competition from concurrently-developing national full copyright superstations. Program owners seeking national exposure for their product might well find it more efficient to deal with such an entity rather than assemble national cable coverage via a patchwork of regional stations. When regional retransmission rights *are* available, the station may encounter difficulties in acquiring rights for the same region (or roster of cable system affiliates) for each program it wishes to carry. This too could reduce the efficiency of regional distribution.

158. If the key ingredient of a regional superstation is, in fact, locally-produced programming, such as news and public affairs, then, to the extent that the station holds the copyright on such programming, it would be free to license that programming to cable systems in the relevant region.[190] They could exhibit this material on a cable channel that the operator "programs" itself. Such a channel could include broadcast material drawn from one or more "regional superstations," plus material from cable services, programming produced by the cable system itself, or other material. An example of this type of programming is found in San Diego, where two cable systems owned by Cox have contracted directly with a Los Angeles network station--KNBC-- for four daily newscasts, three local and one drawn from the NBC Nightly News. They are exhibited on a channel that also includes partial feeds from three cable networks and some local programming.[191]

159. It is also possible that regional superstations might, under full copyright liability, acquire regional retransmission rights to some but not all of their purchased programming. This could include, but would not be limited to, sporting events of regional interest. Regional superstations might develop blocks of time in their daily schedules suitable for licensing to cable systems in the region. These blocks could include programming produced by the station and some for which regional rights were purchased.

160. *Local Signals*. With respect to local signals, the Copyright Act imposes a compulsory license and a royalty rate that is virtually zero.[192] This reflects the original judgment that "there was no evidence that the retransmission of 'local' broadcast signals by a cable operator threatens the existing market for copyright program owners."[193] Under this theory, a program producer licenses product to the local television station, assuming it will be made available to 100 percent of the local viewing area. The amount paid would include the right to reach the local audience, the means being irrelevant. As MPAA points out, however, in today's marketplace cable retransmission may be regarded as a separate market and an additional source of revenue. This assertion is proven in those instances where program producers license programs to both local television stations and cable networks.

161. Local broadcast stations are currently the most popular viewing option, even for cable consumers. Recent Nielsen data show that 62.3 percent of viewing in cable households is devoted to network affiliates, public television stations, and local independent broadcast stations.[194] We believe that local broadcast stations will remain extremely popular with cable operators, because those stations are highly valued by viewers. While leading cable networks, such as ESPN, WTBS, and USA have achieved close to 100 percent penetration of cable households, they continue to have relatively low ratings.[195] Thus, cable operators still attract the majority of their viewers because of their broadcast retransmissions. Moreover, we believe that local broadcast stations are and will remain extremely attractive to program producers as local distribution channels. They are efficient, since they offer close to 100 percent coverage of television households in their service areas. In contrast, cable penetration is 53.8 percent of television households.[196] Programmers also benefit from the popularity of local stations based on their local programming and community involvement. Vesting retransmission rights in copyright holders would permit broadcasters to guard these values into the future.

162. Under full copyright liability, broadcasters would have extremely strong incentives to acquire local cable retransmission rights. The vigor with which the broadcasters have fought for must carry rules demonstrates that. Because producers believe broadcast signals have value, we think it likely that local broadcasters will be able to add cable retransmission to their program rights negotiations agendas and to assemble a package of those rights that can then be transferred to local cable systems.[197] Full copyright liability would permit broadcasters to acquire and control the distribution of programming in a more balanced competitive environment than that which now exists between broadcast stations and cable services. Cable operators would compensate broadcasters for the retransmission of their signals in direct relation to the value viewers place on the signals, as currently occurs with cable services. One additional feature of full copyright liability for local signals is that, in addition to pecuniary matters, local broadcast stations could also negotiate for specific channel assignments on the cable systems. More importantly, viewers would benefit from the additional and/or improved programs stimulated by this more healthy environment.

163. Various commenters have proposed to maintain the compulsory license for local broadcast signals only and to condition it on observance by cable systems of some sort of must carry rules.[198] In early 1988, Congressman Bryant introduced H.R. 4293, the "Cable Subscribers Protection Act of 1988."[199] This bill would condition a compulsory license for local broadcast stations on obser-

vance of the Commission's most recent must carry rules (which were struck down by the Court of Appeals), while eliminating the compulsory license for distant signals. A similar bill was introduced by Senator DeConcini.[200]

164. We believe that, as a matter of logic, must carry rules without the compulsory license would surely alter the balance of bargaining power between the copyright holders and cable systems that would be negotiating retransmission rights. In particular, this situation would likely lead to increased leverage on the part of copyright holders and broadcast stations. Cable operators would be required to acquire rights to local broadcast signals and could not credibly threaten, in the course of negotiations, to refuse to purchase the retransmission rights. If the Congress should adopt legislation reimposing some sort of must carry rules, then we would recommend that retention of some sort of compulsory license for local broadcast signals be considered.[201]

Transactions Costs Under the Copyright Royalty Tribunal

165. In 1976, it was impossible to forecast the level of transactions costs that would be associated with the compulsory license/CRT method of compensation. After 10 years of experience with the CRT, some data and informed opinion are available, both from the comments of participants in CRT proceedings and from CRT decisions and reports. The costs of the system have been borne primarily (but not exclusively) by copyright holders. Some costs have also accrued to cable systems. While most costs of supporting the government bodies that supervise the process (*i.e.*, the CRT and the Licensing Division of the U.S. Copyright Office) are defrayed by deductions from the royalty funds contributed by cable operators, some funds from general tax revenues are also used. While the data do not permit a precise estimate of the transactions costs of the compulsory license system, they do suggest that the cost is non-negligible.

166. Copyright holders face three types of transactions cost under the present system.[202] They are: 1) participation in distribution and rate adjustment proceedings of the CRT (including appearances before that body and settlement negotiations among themselves) ; 2) litigation asociated with these proceedings; and 3) underwriting the expenses of the CRT and the Licensing Division of the U.S. Copyright Office. Cable operators participate in CRT rate adjustment proceedings and associated litigation, and also incur the costs of filling out Statements of Account twice each year and submitting them to the Copyright Office. Some cable operators hire outside counsel to prepare and review the Statements of Account. While these costs are probably not large on a per-system basis, when summed over roughly 11,000 entities that are required to file them, the total is significant.

167. Participation by copyright holders in CRT distribution proceedings involves negotiations with other copyright holders in an effort to agree on the division of funds without recourse to the CRT, litigation of any remaining disputes before the CRT, and, in many cases, appeal to the D.C. Circuit of unfavorable decisions. The CRT's rate adjustment proceedings also present costs--of preparing and submitting testimony to the CRT, and of appeal to the D.C. Circuit in the event of an unsatisfactory outcome. Two of the CRT's three rate adjustment proceedings have been appealed, as were six of the eight distribution proceedings that have been completed to date. The rate adjustment proceeding that took place in response to the Commission's 1980 decision to rescind its distant signal importation and syndicated exclusivity rules was a major undertaking.

168. The costs incurred by copyright holders for participation in CRT proceedings are discussed by ABC, ASCAP, BMI, and SESAC, the Canadian Broadcasting Corporation, and MLB.[203] MLB offers the most extensive discussion of transactions costs.[204] It notes that "copyright owners have had to incur substantial internal costs as well as legal, consulting, and witness fees" in order to support their cases before the CRT and to enable them to engage in settlement negotiations with each other.[205] MLB also mentions several other types of proceedings in which copyright holders have been required to participate in connection with the compulsory license. They include Copyright Office rule makings to construe cable provisions of the Copyright Act, litigation challenging such rules, and Congressional hearings. MLB refers to "serious differences of opinion on how the Copyright Act should be construed" between cable operators and copyright owners" that have led to many "individual disputes, some of which have led or likely will lead to litigation." [206] Moreover, MLB notes that copyright owners must "monitor the more than 15,000 statement of account filings and royalty payments which are now being made by the cable industry each year with the Copyright Office."

169. The number of hearing days devoted to cable copyright matters by the CRT provides a crude indicator of the magnitude of the disputes involved and the costs of the process. MLB asserts that "some 200 hearing days" were needed to "resolve controversies over just the 1978-84 funds."[207] A review of CRT annual reports and other documents yields 237 hearing days for the 1978-85 royalty distribution proceedings and the three royalty adjustment proceedings (1980 and 1985 inflation adjustments and the 1982 adjustment for changes in the Commission's distant signal and syndicated exclusivity rules.)[208]

170. The Copyright Act provides that the expenses of administering the compulsory license be deducted from the royalties pool. Deductions are made to cover the operations of the Licensing Division of the U.S. Copyright Office and most of the expenses of the CRT. The entire budget of the Licensing Division is covered by deductions from the cable television and juke box royalty funds. Roughly 76 percent of that total comes from the cable fund. The 1987 cable royalty fund contribution was $703,320. In 1978, it was $215,404.[209]

171. The 1987 cable royalty fund contribution to the CRT was $250,000, compared to $27,919 in 1978. The CRT also gets part of its budget from congressional appropriations. The budget is prepared and appropriations made on a fiscal year basis, while royalties are collected and royalty contributions made on a calendar year basis. The CRT's fiscal 1987 budget is $629,000, of which $125,000 (roughly 20 percent) is appropriated. The other $504,000 comes from cable television and juke box royalty funds for various years. As with the Licensing Division, the allocation between the two is based on relative amounts of staff time spent on maintaining the two funds. Most of the fiscal 1987 contribution of $504,000 comes from the cable fund.

172. These administrative expenses have been rising steadily over time, particularly those of the Copyright Office. They are likely to continue increasing, since they are based on the number of registration forms filed by

cable systems each year and the number of cable systems is increasing. (These forms are filed separately by each cable system, regardless of MSO ownership.) The expenses of the CRT are likely to rise slightly with inflation. However, due to the small size of the agency (currently seven employees) which is controlled by the statute, the budget of the CRT is unlikely to increase (or decrease) significantly. The government administrative costs of the compulsory license thus appear to be approximately one million dollars per year.

173. Some commenters have claimed that delays in the disbursement of royalties reduce program suppliers' certainty regarding projected revenues and that this constitutes an additional cost of the compulsory license system.[210] While we do not have sufficient information to evaluate the assertion of a cost, an examination of the record of CRT distribution proceedings bears out the contention that there have been delays in disbursement.[211] Typically, the CRT makes partial disbursements during the course of the distribution proceeding, holding back only that which it deems necessary to settle any controversies. Nevertheless, in every case but one, a period of one and one-half or more years elapsed between the end of the year for which royalties had been collected and the first partial distribution. In many cases, significant fractions of the funds were not distributed until two and one-half years had elapsed. The exception was 1982, in which 90 percent of the fund was distributed in December of 1983.[212]

174. The CRT's distribution proceedings do not begin until several months after the end of the year for which royalties have been paid. For example, the CRT's initial notice in the 1986 distribution proceeding, to ascertain whether a controversy exists concerning the distribution of funds, was adopted on December 10, 1987, while the declaration that a controversy exists was adopted on April 18, 1988. The 1987 proceeding has not yet begun. The distribution proceedings frequently take a long time to complete,[213] and, as noted above, are frequently appealed. Thus, there is, in fact, a substantial interval between the use of copyrighted works by cable television systems and the receipt by copyright claimants of compensation for it. Uncertainty attaches to both the timing and the amount of this compensation.

175. The available evidence thus suggests that the transactions costs of the compulsory license system are significant.[214] For 1987, the cost of CRT and U.S. Copyright Office participation in administering the compulsory license was over $1,000,000. In addition to this, copyright holders incur costs of participating in CRT distribution and rate adjustment proceedings and costs of litigation stemming from those proceedings. Cable operators incur costs of participating in rate adjustment proceedings and associated litigation. They also bear the burden of preparing Statements of Account twice a year for the U.S. Copyright Office. The transactions costs of the compulsory license may well differ from year to year depending on whether or not copyright claimants come to settlement agreements and whether or not CRT decisions are appealed. It is clear that the possibility for expensive litigation cannot be ruled out. While a full copyright liability regime also has transactions costs, it brings consumers the benefits of improved program production and distribution, in addition to saving the costs of running the compulsory license system. We now turn to a brief discussion of how a transition from the compulsory license to full copyright liability might be managed.

V. The Transition to Full Copyright Liability

176. The existence of the compulsory license means that there are currently very limited incentives for broadcasters to acquire cable retransmission rights to their programming. Moreover, the compulsory license system has been in operation for a substantial period of time. Industry practice, including standard program contract terms, has adjusted to that system. It therefore seems appropriate to move to full copyright liability only after a transition period. During that period, the arrangements and institutions needed to implement full copyright liability could be set up. Time would also be available for renegotiation of program contracts if necessary.

177. We have no basis at this point for proposing a specific length for the transition period. The transition provided in our *Syndicated Exclusivity Report and Order* (one year, extended to almost 18 months on reconsideration)[215] should probably serve as a lower bound on the length of the transition period for elimination of the compulsory license.

178. The Congress may wish to consider using the framework of the recently-enacted "Satellite Home Viewer Act of 1988" to structure the transition.[216] That act extends the compulsory license to include secondary transmissions by satellite carriers of broadcast signals for private home viewing. This compulsory license will terminate on December 31, 1994. For the first four years that it is in effect, the Act prescribes royalty rates of $0.12 per subscriber per station per month for independent stations and $0.03 per subscriber per station per month for network stations. (The license for network stations is limited to unserved households.)

179. For the final two years of the license term, the Act sets up a "voluntary negotiation" mechanism. Under this procedure, "satellite carriers, distributors, and copyright owners entitled to royalty fees under this section shall negotiate in good faith in an effort to reach a voluntary agreement or voluntary agreements for the payment of royalty fees."[217] In the event that some or all carriers are unable to reach voluntary agreements with copyright holders, the Act provides for the royalty rates to be set by compulsory arbitration. This process would be conducted under the supervision of the CRT by independent arbitrators.

180. Two aspects of this structure might be applied to the cable compulsory license. First, Congress might adopt the December 31, 1994 sunset date of the home satellite compulsory license as the date for terminating the cable compulsory license. This would fix the transition period at six or fewer years, depending on when the terms of the compulsory license were altered legislatively. Second, Congress could apply some or all of the royalty determination mechanism in the Act to the cable compulsory license during the transition. Requiring the parties in interest to make an attempt to agree voluntarily on royalty rates could well stimulate the formation of some of the institutions that would be needed in a full copyright liability regime.

181. The application of the home satellite market royalty structure to cable at some point in the transition could also encourage movement in the direction of full

copyright liability and the development of the requisite institutions. In addition to effecting an important simplification in the system, one recommended by the U.S. Copyright Office,[218] this measure would, in a wide range of cases, provide an increase in the rates paid by cable systems for distant signals. Such an increase could constitute an interim step on the path to full copyright liability.

182. The following illustrative rate calculations demonstrate how this procedure would affect royalty payments during such an interim period. They are based on a national average basic cable subscription rate for 1987 of $13.11.[219] Form 1 and Form 2 cable systems face an incremental cost of zero for distant signals. The move to $0.12 per subscriber per month for each distant independent signal and $0.03 per month for each distant network signal would clearly represent an increase.[220]

183. Basic rates paid by Form 3 cable systems are a fixed fraction of gross receipts for each distant signal equivalent. (*See* appendix A *infra* for a definition and a more detailed description of royalty calculations.) For the first distant signal equivalent, the fraction is 0.00893; for the second through fourth, it is 0.00563; and for those in excess of four, it is 0.00265. Cable systems in the top 100 markets are also subject to syndicated exclusivity surcharges for some of their signals.

184. Making use of the $13.11 average monthly basic cable subscription rate, it is possible to calculate the royalty payment for Form 3 systems for various categories of signal. "Permitted" distant signal equivalents are subject to the basic rate and, if the cable system is in the top 100 markets and the signal is not "exempt," these distant signal equivalents are also subject to the syndicated exclusivity fee. For those subject only to the basic rate, the monthly fee per subscriber for the first distant signal equivalent is $0.117. The figure for the second through fourth distant signal equivalents is $0.074, while that for the fifth and succeeding distant signal equivalents is $0.035. In each case, a move to $0.12 would represent an increase. However, it should be noted that few cable systems have five "permitted" distant signals. Those carrying "non-permitted" distant signals are subject to a fee of 3.75 percent of gross receipts for each "non-permitted" distant signal equivalent. At the 1987 average basic cable subscription rate, this fee is $0.49 per distant signal equivalent per subscriber per month.

185. Calculations can also be made for signals subject to the syndicated exclusivity surcharge. In the top 50 markets, the rate for the first distant signal equivalent subject to the syndicated exclusivity fee is $0.196. The analogous figure for the second through fourth distant signal equivalents is $0.123. The comparable figures for systems in the second 50 markets are $0.156 for the first distant signal equivalent and $0.099 for the second through fourth. As noted above, the CRT is likely to revise this fee downward in response to the Commission's reimposition of syndicated exclusivity rules. Hence, even where the current rate is above $0.12, in many cases it is likely to be reduced. In any event, it is certainly possible to prescribe a rate equal to $0.12 *or* the rate implied by the current system, whichever is higher.

186. Another measure that might be considered in a transition period is to prohibit (or otherwise limit) the addition of distant signals to existing and/or new cable systems pursuant to the compulsory license. In this way, deviation from the status quo would have to be accomplished with full copyright liability. These specific suggestions are tentative in nature. They are meant to provide a starting point for deliberations on a transition mechanism.

VI. SUMMARY AND CONCLUSIONS

187. In this inquiry, we sought to compare the compulsory license to alternative mechanisms for authorizing cable systems to retransmit television broadcast signals, with a view to determining whether it or another regime best serves the public interest. Some commenters defended the compulsory license and others opposed it. With extremely limited exceptions, critics of the compulsory license called for full copyright liability, at least for distant signals. Our analysis focused on those two options. We determined that, under full copyright liability, consumers are likely to benefit from improved production and distribution of programming. Incentives for program production would be strengthened and the menu of options available would be broadened. Program distribution would be more efficient in the absence of the artificial advantage that currently accrues to the cable medium. Moreover, our examination established that while there was concern when the compulsory license was adopted that the transactions costs of full liability would be unacceptably high, under current circumstances such transactions costs would not be unduly burdensome. For these reasons, we have concluded that the public interest would be better served by a full copyright regime for cable retransmission of broadcast signals. We therefore recommend that the Congress repeal the compulsory license.

188. The transactions cost argument is the principal one advanced today by the proponents of the compulsory license. They argue that the transactions costs of a full liability regime would be unreasonably burdensome and that those costs would unduly limit the availability of broadcast signals over cable. We found that the growth and development of many cable networks since the Copyright Act was passed strongly suggests that cable systems, or intermediaries for them, are quite capable of acquiring cable retransmission rights to broadcast programming and making that programming available to cable subscribers. Transactions costs would *not* be an unmanageable burden. Moreover, transactions costs under the compulsory license are non-negligible. Additionally, we determined that, with such a wide array of non-broadcast programming available to cable today, broadcasters do not have incentives to attempt to foreclose cable subscribers from access to their programming. Indeed, because of cable's wide penetration today, local broadcasters value cable carriage highly. Such carriage can extend the station's reach and/or improve the quality of viewers' reception.

189. We found that the most likely mechanism for providing broadcast programming to cable systems is "networking." Broadcast stations are likely to evolve into retransmission rights packagers, with cable systems operating in a role analogous to "affiliates." Packages of retransmission rights could encompass the entire programming day of the broadcast stations, or only a part of it. This would depend on the range of programming for which the station acquired retransmission rights. Such rights could be negotiated for and acquired in the same proceedings during which the stations now bargain for broadcast rights to programming. This process could work for nationally, regionally, or locally retransmitted stations.

In some cases, national superstations might actually evolve into full copyright cable program channels. In any event, while the manner of delivery of some programming would doubtless change under full copyright liability, and while certain areas might gain access to new material and others lose access to some, even in the short run, a wide and diverse range of programming would remain available to cable subscribers. Over time, the improvement in information on consumer preferences and the stronger incentives to meet those preferences brought about by the move to full copyright liability seem certain to benefit viewers by stimulating new program production and more efficient program distribution.

190. The marketing of cable retransmission rights to broadcast programming will generate additional information on consumer preferences, as well as additional revenue for copyright holders. This will lead to a range of programming that more closely matches consumer tastes. Moreover, programmer choices among alternative distribution media (cable versus broadcast) will no longer be distorted by what has been, in essence, a subsidy to one medium (cable).[221] These benefits of full copyright liability, plus our conclusion that such a regime can in fact be implemented with reasonable transactions costs, lead us to recommend elimination of the compulsory license.[222]

191. Accordingly, IT IS ORDERED, THAT this proceeding on the compulsory copyright license for cable retransmission is TERMINATED.

192. IT IS FURTHER ORDERED, THAT the Secretary SHALL FORWARD copies of this *Report* to the appropriate Committees and Subcommittees of the House of Representatives and the Senate.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

The Methodology of Royalty Calculations for Form 3 Systems

193. This appendix describes the methodology for calculating royalty payments for Form 3 cable systems.[223] These systems are the only ones for which distant signal carriage information is utilized in the royalty calculation. Form 3 systems are those with semiannual gross receipts greater than $292,000. They constitute 1,820 of the 11,612 entities that qualify as cable systems under Copyright Office rules.[224] For this purpose, "gross receipts" includes "amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters." It does not include revenues derived from premium services. Although it corresponds roughly to basic cable revenues, there has been some controversy about the definition.[225] In any event, if the relevant monthly per subscriber fee were $10, then form 3 systems would be those with 4,867 subscribers or more. If the relevant fee were $15, the cutoff would be 3,244 subscribers.

194. The royalty calculations are based on "distant signal equivalents," or "DSEs." Distant independent stations carried by the system count for 1.00 DSEs each, while distant network stations and distant non-commercial educational stations count for 0.25 DSEs each. The legislative history of the Copyright Act of 1976 indicates an intention to provide additional compensation for distant non-network programming only, and the 0.25 figure reflects a judgment that 25 percent of the programming of network affiliates is non-network. Although not explicitly mentioned in the House Report, it appears that educational stations are treated as "affiliates" of a PBS network.

195. The basic fee is calculated based on the number of "Permitted DSEs" carried by the cable system, *i.e.*, the number of DSEs accounted for by signals that were or could have been carried pursuant to FCC rules as of June 24, 1981. The current rates are as follows (expressed in shares of gross receipts): .00893 for the first permitted DSE or any fraction thereof; .00563 per DSE for each DSE greater than one and less than or equal to 4; and .00265 per DSE for each DSE greater than four. The original rates in the statute had this same declining share of gross receipts structure. The minimum payment of the rate for one DSE, even by systems that in fact did not carry any DSEs, was rationalized as a fee for "the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter."

196. The "3.75 fee" is simply equal to 3.75 percent of gross receipts multiplied by the difference between total DSEs and Permitted DSEs. This higher, flat per-DSE rate applies to signals added in response to the elimination by the FCC of its distant signal limitation rules.

197. The syndicated exclusivity fee is based on the difference between permitted DSEs and exempt DSEs. Exempt DSEs are those accounted for by signals that were carried prior to March 31, 1972 in any community served by the cable system *i.e.*, carried prior to the introduction of syndicated exclusivity rules. Those rules, which were eliminated by the FCC in 1980, applied only in the top 100 television markets. The fee also applies only in those markets. The syndicated exclusivity surcharge for systems in the top 50 television markets, expressed as a fraction of gross receipts, is equal to .00599 if permitted minus exempt DSEs is less than or equal to one. If that figure is greater than one but less than or equal to four, the surcharge is .00599 plus .00377 multiplied by permitted DSEs less exempt DSEs minus one. If the figure is greater than four, the surcharge is calculated as .00599 plus (3 x .00377) plus .00178 times the excess of permitted less exempt DSEs over four. For systems in the second 50 markets, the structure is the same, but the surcharges are .0300, .00189, and .00089, respectively.

198. Generally speaking, permitted DSEs, as used in these calculations, are those attributable to signals that were carried or could have been carried on any portion of a cable system prior to June 25, 1981, pursuant to FCC rules in effect at that time. This includes "grandfathered" stations, *i.e.*, those which a cable system was "authorized to carry or was lawfully carrying prior to March 31, 1972." Such stations may be carried even if they are in excess of the signal complement allowed by the Commission's former distant signal importation quotas (which were embodied in the Commission's rules as of June 24, 1981). Stations carried on or after June 25, 1981 are permitted if they could have been carried under the rules

in effect on June 24, 1981 without violating the distant signal importation quotas, or if they are carried pursuant to an individual waiver granted between April 16, 1976 and June 25, 1981, pursuant to FCC rules and regulations in effect on April 15, 1976. Also permitted are stations of the same type substituted for carried network, noncommercial educational, or regular independent stations for which a distant signal quota would have been imposed. There are a few additional types of permitted signal, but these are the main ones.

199. Distant signal importation quotas in the Commission's former rules applied to systems in major television markets (*i.e.*, the top 100) and to those in smaller television markets. These terms are defined in 47 C.F.R. Sec. 76.5 and 76.51. Systems outside all major and smaller television markets were subject to no quotas. For systems in smaller television markets, the relevant quota was three network affiliates (one from each commercial network), one independent station, and all educational stations for which local educational stations did not object to their importation. Thus, cable systems could import enough distant signals, such that the imported signals *plus* whatever local signals were available added up to three network affiliates and one independent station.

200. Systems in the top 50 television markets had a quota of three network affiliates (one from each commercial network), three independent stations, and educational stations to the importation of which no local educational station objected. Systems could also import up to two additional independent stations. The additional number of stations was two minus the number that the system imported in order to reach the quota of three. For example, a system in an area with two local independent stations would need to import one to reach the quota of three. The additional authority would be for one (two minus one) additional independent station. Furthermore, if there are no local independent stations, one of those imported had to be a UHF station.

201. For systems in the second 50 television markets, the quotas were the same as for the top 50, with one exception. The basic signal quota was three network stations and *two* independents.

APPENDIX B

The Effect of the Compulsory License on Program Development Incentives: A Stylized Example

202. This appendix provides an illustration of the unfavorable impact of the compulsory license on incentives to develop new programming. The simple numerical example presented here is drawn from Besen.[226] Suppose a broadcaster in market A is willing to pay 200 for the right to show a program in market A and a broadcaster in market B is willing to pay 100 for the right to show the same program in market B. The program will be produced and shown in these two markets as long as its production and distribution costs do not exceed 300. Suppose further that the program in question is representative of other programming that is available and that the supply of programs is roughly in line with the demand for programs at prevailing prices and production costs.

203. Now introduce into market B a cable system whose only source of programming is the retransmission of broadcaster A's signal into market B. Broadcaster B's willingness to pay 100 for the program in question was based on the size of the audience he could deliver to his advertisers, but with cable offering the program as well, broadcaster B can expect to lose some viewers, and hence some advertising revenue. In particular, suppose broadcaster B's willingness to pay for the program falls from 100 to 60. Suppose further, however, that the addition of the option to view the program on a distant signal carried by cable enhances the overall value of the program to viewers in market B and that cable would be willing to pay 60 for the program if it had to buy the rights to transmit the program. In other words, suppose some additional audience is created by the presence of cable over and above the audience that is diverted from broadcaster B to the cable system.

204. In a well-functioning market with many programs being shown on retransmitted distant signals, this increase in the value of representative programming from 300 to 320 should provide a signal to producers that programs are more valuable than they used to be and that more and/or better programs should be produced. Such a signal is transmitted clearly under full copyright, but it is much more likely to become garbled when a compulsory license substitutes for full copyright.

205. Consider first the case of full copyright. Assuming for the moment that advertisers in market A attach no value to audience in market B, the program producer's revenue from broadcasters falls because broadcaster B's willingness to pay has fallen from 100 to 60 and there has been no commensurate increase in broadcaster A's willingness to pay (As Besen notes, a snow tire ad on a Chicago-based station will generate few sales when retransmitted on a Miami cable system). With cable subject to full copyright liability, however, and willing to pay 60 for the program, the loss of 40 from broadcasters is more than made up by the gain of 60 from cable. In fact, program producers' expected revenue rises in line with the increase in the value of their programs, and a profit incentive is created to devote more resources to program development.

206. At the opposite extreme, consider what would happen if cable had no copyright liability for programs carried on the distant signals they retransmit. Program producers would lose revenues from broadcasters but would not be able to recoup these losses from cable operators. In our example, the revenue earned from a representative program would fall from 300 to 260. Far from sending the proper signal to producers to produce more and better programs, a market in which there was no cable liability for cable retransmission sends the signal that programs are less valuable than they were before cable began retransmitting distant signals.

207. Of course, markets are highly resourceful and adaptable. Under some circumstances, the full increase in the value of the program in market B might be reflected in the price the program producer can charge broadcaster A, in which case the copyright regime would be largely irrelevant. For this to happen, however, broadcaster A would have to be indifferent between audience in market A and audience in market B, contrary to our initial working assumption. Such a situation may well characterize regional or national superstations who have made the conscious decision to substitute regional or national advertising for local advertising; but there are many "pas-

sive" superstations who have not chosen to abandon local advertising and who place little or no value on audience in distant markets where cable systems carry their signal.

208. Even supposing broadcaster A in our example is a passive superstation, a resourceful program producer might offer broadcaster B an exclusive license to show the program in market B. If broadcaster B is also resourceful, he might offer to allow the cable system to show the program as well (by retransmitting the signal of broadcaster A) in return for a fee of 60. Broadcaster B ought to be willing to pay 120 (60 earned from his own broadcast and 60 collected from cable). Thus, if these transactions were to take place, program producers would receive the proper market information despite the absence of satisfactory copyright arrangements. Of course, none of this would have been possible prior to our recent action to restore syndicated exclusivity.

209. The point of these examples of how the market might work satisfactorily despite unsatisfactory copyright arrangements is not that the copyright regime is irrelevant but that the market can often overcome, at least to some extent, regulatory barriers to good performance. Nevertheless, inappropriate regulations force market participants to choose from among an unnecessarily constrained set of options.

210. The foregoing material strongly suggests that the compulsory license is unlikely to generate the same kinds of price signals as would be generated under full copyright. Consider our simple example once again. The broadcaster in market B and the cable operator in market B would each be willing to pay 60 for a non-exclusive right to show the program, whereas the program is worth 100 to the broadcaster if there is no cable competition. It would be beyond the capabilities of the CRT as currently staffed and funded (or as it could ever reasonably be expected to be staffed or funded) to elicit the information that would allow it to determine that the loss to the broadcaster is 40 from cable duplication, much less to elicit the information that would allow it to determine that the gain to the cable system would be 60. Now ask the CRT to make such a determination for hundreds of programs, hundreds of broadcasters, and hundreds of cable systems. This task is surely no less daunting or expensive than the negotiations required to bring program suppliers and distributors together in the marketplace, and we have seen that it is considerably less likely to reach the best outcome for viewers.

211. In general, then, the compulsory license regime can only approximate a market outcome. Moreover, as the following extension of the example shows, the compulsory license is likely to yield lower revenues to producers than they would receive under full liability. In turn, the reduced revenues reduce the incentives to invest in the development of new programs. Suppose that CRT payments for the program in our example are 35, so that expected revenues to the producer total 295 (200 from broadcaster A, 60 from broadcaster B, and 35 from the CRT). This reduction in revenue from the 300 realized before the introduction of cable will lead the program producer to cut back on his investment in program development, which, in turn, will reduce the value of the program to broadcasters and cable viewers. Broadcaster A will no longer be willing to pay 200; nor will broadcaster B be willing to pay 60. Thus, the program producer's realized revenue will be less than the 295 he might initially expect, leading to a further reduction in program quality.

212. Suppose, when the dust settles, the value of the program to broadcaster A is 190, the value of the program to broadcaster B is 50, and the value of the program to cable viewers is 50. The value of the program to all viewers combined is now 290, whereas it was 300 prior to the introduction of cable, and it would be 320 under full copyright. In other words, the failure of the compulsory license process to provide appropriate revenues and appropriate price signals can actually reduce the value of programming below what it would be without cable. Such a disastrous outcome is not inevitable, of course, but there are no safeguards in the compulsory license system that would prevent its occurring.

213. To recapitulate, cable retransmission of distant signals under the compulsory license reduces broadcasters' ability to attract advertising and therefore reduces their willingness to pay for programs. Nor does the compulsory license provide an efficient mechanism for program suppliers to capture revenues commensurate with any additional audience created through cable retransmission of distant signals. Distributions by the CRT are an inadequate and imperfect substitute for the revenues that would be derived through market transactions. On balance, therefore, we conclude that producers have less incentive to supply programs under the compulsory license than they have under full copyright. As a result, viewers are not getting as many or as high quality programs as they would get under full copyright.

APPENDIX C

Statistics on Disbursements of Cable Royalty Funds

Table 2

Deductions From Cable Royalty Funds for Expenses of the Copyright Office and the CRT

Year	Copyright Office	CRT	Total
1978	$215,403.72	$27,919.21	$243,322.93
1979	273,218.00	46,729.90	319,947.90
1980	323,950.00	88,704.25	412,654.25
1981	355,916.00	155,827.00	511,743.00
1982	374,667.00	168,326.00	542,993.00
1983	508,848.00	382,525.00	891,373.00
1984	565,099.00	214,000.00	779,099.00
1985	556,697.00	229,000.00	785,697.00
1986	552,750.00	360,000.00	912,750.00
1987	703,320.00	250,000.00	953,320.00
Total	$4,429,768.72	$1,923,031.36	$6,352,800.08

Notes: The budget of the Licensing Division of the U.S. Copyright Office is covered by contributions from the cable television and jukebox royalty funds. According to Division staff, roughly 76 percent comes from the cable fund. The allocation is made in proportion to staff time spent on each activity.

The royalties are collected by calendar year, while the agency budgets are in a fiscal year basis. The CRT's fiscal 1987 budget was $629,000 with

$504,000 authorized to come from the royalty contributions and an appropriation of $125,000. (*See 1987 Annual Report of the CRT, supra* table 1, at 11.)

Table 3

Dates of Distribution of
Cable Television Royalty Funds

1978		**1982**	
May 8, 1981	50%	December 1, 1983	90%
July 23, 1982	50%	March 7, 1985	6%
		March 26, 1986	"Final"
1979		**1983**	
July 2, 1982	50%		
January 12, 1984	35.5%	June 27, 1985	50%
March 7, 1985	10.5%	June 26, 1986	30%
December 19, 1985	0.8%	March 19, 1987	20%
March 20, 1986	"Final"		
1980		**1984**	
		June 14, 1986	78%
May 6, 1983	50%	April 23, 1987	22%
August 11, 1983	30%		
March 7, 1985	6%	**1985**[b]	
December 19, 1985	7%		
March 20, 1986	"Final"	July 23, 1987	99%
		September 3, 1987	1%
1981		**1986**	
August 11, 1983	85%		
November 17, 1983	5%	April 21, 1988	53% (c)
April 23, 1984	6.5%		
March 7, 1985	(a)		
December 19, 1985	0.8%		
March 20, 1986	"Final"		

Table 3

Dates of Distribution of
Cable Television Royalty Funds
(continued)

Source: CRT files, Orders, and *1987 Annual Report of the CRT, supra* table 1.

Notes: All percentages are approximate. Some very small distributions (of late-paid contributions, etc.) are not listed here. "Final" means "all remaining funds."

a This distribution was made to bring the total up to 96%, *including* funds paid in subsequent to the earlier distributions.

b Roughly one half of one percent of the total has not yet been distributed.

c Approximate figure, calculated from table 1.

APPENDIX D

List of Commenting Parties

American Society of Composers, Authors and Publishers, Broadcast Music, Inc. and SESAC, Inc.

Association of Independent Television Stations, Inc.

Capital Cities/ABC, Inc.

Canadian Broadcasting Corporation

CBS, Inc.

Coalition of Small Cable Television System Operators

Cole, Raywid and Braverman

Community Antenna Television Association

Community Broadcasters Association

Henry Geller and Donna Lampert

Joseph S. Gans, Inc.

Lorimar Telepictures Corporation

Major League Baseball

Mid-Coast Cable Television Inc.

Motion Picture Association of America

National Association of Broadcasters

National Association of Video Distributors

National Basketball Association and National Hockey League

National Broadcasting Company, Inc.

National Cable Television Association

National Public Radio

National Rural Telecommunications Cooperative*

National Telecommunications and Information Administration

Public Broadcasting Service, National Association of Public Television Stations and Corporation for Public Broadcasting

Richard S. Leghorn

Tele-Communications, Inc.

Tempo Enterprises, Inc.

Time, Inc.

Turner Broadcasting System, Inc.

United Video, Inc.

U.S. Copyright Office

* reply comments only

FOOTNOTES

[1] 47 U.S.C. 151.

[2] 47 U.S.C. 154(k)(4).

[3] 47 U.S.C. 521. The 1984 amendments were contained in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (1984).

[4] Some of the history of this relationship is presented in section II *infra*.

[5] We therefore reject the assertions of some commenters that this inquiry is beyond our jurisdiction. *See* Comments of Cole, Raywid, and Braverman at 3 (filed Aug. 6, 1987), Comments of Mid-Coast Television at 2 (filed Aug. 6, 1987), and Comments of Turner Broadcasting System, Inc. at 4-5 (filed Aug. 6, 1987) (*Turner Comments*). For views of commenters affirming our jurisdiction to undertake this inquiry, *see* Comments of the National Association of Broadcasters at 2 (filed Aug. 6, 1987) (*NAB Comments*), Comments of the National Telecommunications and Information Administration at 2 (filed Aug. 5, 1987) (*NTIA Comments*), and Reply Comments of CBS, Inc. at 6 (filed Oct. 5, 1987).

[6] *See* 47 C.F.R. Sec. 658(j); FCC Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership, and Regulation* (1980) (2 vols.).

[7] *See Second Report* in Gen. Docket No. 86-336, 3 FCC Rcd 1202 (1988), especially para. 1. *See also* the Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949, 3958-59 (1988) (originally H.R. 2848, now S. 1883), wherein Congress instructs the Commission to undertake three additional inquiries on home satellite dish programming issues.

[8] 17 U.S.C. 101, 111(c), 111(d). *See also Copyright Law Revision*, H. Rep. No. 94-1476, 94th Cong., 2d Sess. at 63, 88-91 (1976) (*House Report*).

[9] 17 U.S.C. 111, 801-804. In general, however, the new copyright law relies heavily on market mechanisms to encourage and reward creative activity. *See* 17 U.S.C. 106.

[10] *House Report*, *supra* note 8, at 89.

[11] *See* section III *infra* for a discussion of the relation between compulsory license and market rates. It is suggested there that, while the basic rates under the compulsory license are below market levels, the rates for signals added pursuant to the relaxation of our distant signal limitation rules in 1980 may well be above market levels in many cases.

[12] In principle, where compulsory license rates are above market levels, programmers and cable operators could agree to bypass the compulsory license and negotiate a lower rate. We believe that the incentives to do this are extremely weak. The above market rates are likely to be for those signals that became eligible for importation when the Commission eliminated its distant signal importation limits in 1981. Such signals are referred to as "non-permitted," (*i.e.*, not permitted to be carried under the Commission's prior rules). *See Report and Order* in Dockets 20988 and 21284, 79 FCC 2d 663 (1980), *aff. sub nom. Malrite T. V. of N. Y. v. F.C.C.* 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 45 U.S. 1143 (1982). Those limits were specified in terms of a permitted signal complement for cable systems in various types of market. Hence, the same station may be carried as a "permitted" distant signal (at rates probably below market levels) by many cable systems and carried, or potentially carried, as a "non-permitted" signal by others. Indeed, the separate fee for non-permitted signals does not even apply to certain classes of cable system. With a signal subject to widespread carriage at below-market rates, the net benefit to programmers from negotiating *ad hoc* rates outside of the compulsory license system for some additional cable carriage is probably slight. *See* Appendix A for a detailed explanation of the fee schedule under the compulsory license.

[13] Moreover, full copyright liability would also lead to increased compensation via more efficient sales of advertising time. *See infra* at para. 89.

[14] Our new syndicated exclusivity rules will allow them to confer exclusive distribution rights on local broadcast stations. Producers themselves can enforce syndicated exclusivity rights in areas for which no broadcast rights have been sold. However, producers can only exercise this right for a period of one year from the first broadcast syndication licensing of the program in question anywhere in the United States. *See Report and Order* in Gen. Docket No. 87-24, 3 FCC Rcd 5299 (1988) (*Syndicated Exclusivity Report and Order*) *recon. grtd in part and denied in part*, 4 FCC Rcd 2711 (1989), pet. for rev. filed, *United Video, Inc. v. FCC*, Nos. 88-1514, et al. (D.C. Cir. July 20, 1988).

[15] Because most of the country is served by local affiliates of the three major commercial networks, network affiliates are unlikely to seek or to receive national cable retransmission rights to its network programming. There is, however, a role for network superstations to reach home satellite dish households that are unserved by local affiliates. *See infra* at para. 57.

[16] For this reason, our discussion below does not encompass the material presented by proponents of the compulsory license to support their claims that the broadcasting and program production industries are thriving. *See, e.g.*, Comments of the National Cable Television Association, Inc. at 18-27 (filed Aug. 6, 1987) (*NCTA Comments*), Comments of the Community Antenna Television Association at 3 (filed Aug. 6, 1988), Comments of Time, Inc. at 5-14 (filed July 22, 1987), and Reply Comments of Tele-Communications, Inc. at 8-11 (filed Oct. 5, 1987) (*TCI Reply Comments*).

[17] Should Congress pass new must carry rules that are sustained by the courts, then we would not recommend eliminating the compulsory license for local signals.

[18] *See Syndicated Exclusivity Report and Order*, *supra* note 14, at paras. 49-89 for a detailed discussion of the public interest benefits of permitting producers and media outlets to negotiate exclusive distribution agreements. The discussion includes in it the case against denying one medium, *e.g.*, broadcasting, the use of this distribution technique while allowing rival media to use it. Our analysis of this issue is confined, of course, to the commercial market for video programming. We take no position on the negotiated license for public television or the other compulsory licenses (*e.g.*, that for jukeboxes) currently embodied in copyright law. *See* 17 U.S.C. 116, 118.

[19] Appendix A provides some additional detail on the methodology of royalty calculations. Appendix B contains an illustrative example of the effects of the compulsory license on program development incentives. Appendix C presents statistics on the disbursements of cable royalty funds, while Appendix D comprises a list of commenters.

[20] *Report and Order* in Docket 12443, 26 FCC 403 (1959).

[21] *Id.* at paras. 65-68, 92.

[22] *Id.* at para. 99.

[23] *Second Report and Order* in Docket 15971, 2 FCC 2d 725 (1966), para. 133.

[24] *Id*, at para. 153.

[25] *Notice of Proposed Rule Making and Notice of Inquiry* in Docket 18397, 15 FCC 2d 417 (1968), para. 35.

[26] *Id.* at paras. 38-43.

[27] *Id.* at para. 37.

[28] *Id.* at paras. 39-40.

[29] *Id.* at para. 39.

[30] *See, e.g., Second Further Notice of Proposed Rule Making* in Docket No. 18397-A, 24 FCC 2d 580 (1970), para. 3; *Cable Television Report and Order*, 36 FCC 2d 143 (1972), paras. 24-26.

[31] *Second Further Notice of Proposed Rule Making* in Docket No. 18397-A, *supra* note 30.

[32] *Id.* at para. 4.

[33] *Id.* at paras. 5, 11.

[34] *See supra* note 30.

[35] *Cable Television Report and Order, supra* note 30, at Appendix E.

[36] *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (local signals). *Teleprompter Corp. v. Columbia Broadcasting System, Inc*, 415 U.S. 394 (1974) (distant signals).

[37] *Teleprompter Corp.*, 415 U.S. at 414.

[38] Besen, Stanley M., Manning, Willard G., Jr., and Mitchell, Bridger M., *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, J. Law & Econ., April 1978, at 73-74.

[39] *House Report, supra* note 8, at 89.

[40] 17 U.S.C. 106. Under the 1976 Act, the duration of copyright is generally the life of the author plus 50 years. 17 U.S.C. 302 et seq. Under the Copyright Act of 1909, the duration of copyright was 56 years (a 28 year term that could be renewed once). *House Report, supra* note 8, at 133-34.

[41] *See supra* note 8.

[42] The computation of royalties under the compulsory license is described briefly *infra* at paras. 35-42 and in more detail in Appendix A.

[43] 17 U.S.C. 801 (b)(2)(A). This provision further specifies that in making this type of adjustment, the CRT should consider the rate of "national monetary inflation." As described below, there have been two adjustments. In the first one, the CRT used the as its inflation measure the Consumer Price Index. In the second one, it accepted, with minor modifications, an industry agreement which made no explicit reference to the inflation index used. *See 1980 Adjustment of the Royalty Rate for Cable Systems*, 46 FR 892 (Jan. 5, 1981); *1985 Inflation Adjustment for Cable Copyright Royalty Rates*, 50 FR 18480 (May 1, 1985). *See also Notice Commencing 1985 Cable Royalty Inflation Adjustment Proceeding and Setting Procedural Dates*, 50 FR 10989 (March 19, 1985).

[44] 17 U.S.C. 801(b)(2) (B) and (C).

[45] *See Report and Order* in Dockets 20988 and 21284, *supra* note 12.

[46] *Adjustment of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry*, 47 FR 52146 (Nov. 19, 1982), aff. *sub nom. National Cable Television Association v. Copyright Royalty Tribunal*, 724 F. 2d 176 (D.C. Cir., 1983). Congress stayed the effective date of the regulations until March 15, 1983. *See Broadcasting*, Jan. 3, 1983, at 31-32.

[47] *See* Appendix A for a more complete discussion of these rates. As in the case of inflation adjustments, parties with a significant interest in these rates are entitled to petition the CRT to reconsider them every five years. The Commission has recently reimposed syndicated exclusivity rules, which are broader in scope than the original ones. *See Syndicated Exclusivity Report and Order, supra* note 14. Presumably, this will prompt the CRT to consider adjusting the syndicated exclusivity fee at some point.

[48] The procedures and criteria specified above for rate changes also apply to adjustments in the gross receipts levels used to divide cable systems into groups for this purpose. *See* 17 U.S.C. 111(d)(2)(C), (D), 801(b)(2)(D).

[49] This has been the case since the first accounting period of 1985, although it was only reflected in U.S. Copyright Office regulations in 1987, according to Licensing Division staff. *See also Compulsory License for Cable Systems*, 52 FR 28252 (July 29, 1987).

[50] *See supra* note 48. *See also* U.S Copyright Office, "Statement of Account for Secondary Transmissions by Cable Systems" (Short Form)--SA1-2.

[51] *See supra* note 48. *See also* U.S. Copyright Office "Statement of Account for Secondary Transmissions by Cable Systems" (Long Form)--SA3.

[52] 17 U.S.C. 111(d)(2)(B). *See* Appendix A for a discussion of how these calculations are made.

[53] 17 U.S.C. 111(d)(1)(A).

[54] *See* 37 C.F.R. Sec. 201.17(b)(1). We note in passing that, while the compulsory license does apply to radio as well as television broadcast stations, we do not consider the issue of radio herein.

[55] *Cablevision Co. v. Motion Picture Association of America*, 641 F. Supp. 1154 (D.D.C. 1986), rev. and remanded 836 F. 2d 599 (D.C. Cir, 1988).

[56] *See, e.g.*, U.S. Copyright Office, "Statement of Account for Secondary Transmissions by Cable Systems" (Short Form)--SA1-2, general instructions, page V, for the accounting period beginning July 1, 1986.

[57] This paragraph describes the statutory directions for distribution proceedings. These directions are found in 17 U.S.C. 111(d)(4), (5) and 804.

[58] The information in the next two paragraphs is drawn from the following CRT decisions: *1978 Cable Royalty Distribution Determination*, 45 FR 63026 (Sept. 23, 1980) (procedures and 1978 claimants and controversies); *1979 Cable Royalty Distribution Determination*, 47 FR 9879 (Mar. 8, 1982) (1979 claimants and controversies); *1980 Cable Royalty Distribution Determination*, 48 FR 9552 (Mar. 7, 1983) and 49 FR 28090 (July 10, 1984) (1980 claimants and controversies); *1981 Cable Royalty Distribution Determination*, 49 FR 7845 (Mar. 2, 1984) (1981 claimants and controversies); *1982 Cable Royalty Distribution Determination*, 49 FR 37653 (Sept. 25, 1984) (1982 claimants and controversies); *1983 Cable Royalty Distribution Proceeding*, 51 FR 12792 (April 15, 1986) (1983 claimants and controversies); *1984 Cable Royalty Distribution Proceeding*, 52 FR 8408 (March 17, 1987) (1984 claimants and controversies); *1985 Cable Royalty Distribution Proceeding*, 53 FR 7132 (Mar. 4, 1988) *(1985 claimants and controversies)*.

[59] *See 1985 Cable Royalty Distribution Proceeding, supra* note 58.

[60] In 1985, MPAA represented copyright holders claiming royalty payments for 5,954 syndicated series, movies, or specials. (Each series is counted as a single program, even if many episodes have been broadcast.) The programs collectively amounted to 575,000 quarter hours of programming. *Testimony of Allen R. Cooper in Behalf of MPAA-Represented Program Suppliers--Phase II at 6, 1985 (Testimony of Allen R. Cooper)*.

[61] The CRT also listed two secondary factors--"(a) quality of copyrighted program material, and (b) time-related considerations." *See 1978 Cable Royalty Distribution Determination, supra* note 58.

[62] *National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F. 2d 367, 374 (1982).

[63] *See 1978 Cable Royalty Distribution Determination, supra* note 58.

[64] *See Adjustment of the Royalty Rates for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, supra* note 46. This point is reiterated later in the same document. After arguing that its discretion to determine the new distant signal and syndicated exclusivity fees is not limited by the statutory schedule for the basic fee, the CRT asserts that "the perceived inadequacies of that schedule provide this Tribunal with no justification to balance the scales by excessive compensation of the copyright owners for those copyrighted works within the scope of this proceeding." *Id.* at 52152. At

another point in this decision, the CRT observed that the statutory rates were "adopted by the Congress to implement an agreement between NCTA and MPAA, in which the fee schedule was only one of a number of accommodations reached on cable copyright issues. *Id.* The same opinion has been expressed by the D.C. Circuit. NCTA v. CRT, 724 F. 2d 176, 185 (D.C. Cir., 1983).

[65] *Adjustment of the Royalty Rates for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry, supra* note 46.

[66] *Id.* at 52155. In the same document, the CRT also found that there was "no public policy justification for establishing royalty rates below reasonable marketplace expectations of the copyright holders." With respect to the syndicated exclusivity fee, the CRT imposed "an additional fee on the royalty rate already in existence to compensate the copyright owners for losing blackout protection." *Id.* at 52153.

[67] In describing the distant signal fee determination, the court noted that "the Tribunal sought to estimate a market price in the absence of a functioning market." *NCTA v. CRT,* 724 F. 2d 176, 187 (D.C. Cir., 1983). The portion of the decision upholding the syndicated exclusivity fee refers back to the reasoning used to support the distant signal fee. *Id.* at 188.

[68] *Broadcasting,* Aug. 22, 1988, pp. 32-33, 38.

[69] *Cablevision,* Aug. 15, 1988, p. 65. This compilation does not appear to include pay-per-view services. In addition to the services mentioned in the text, this listing includes 11 text services and nine audio services.

[70] *Comments of the Motion Picture Association of America, Inc.* in Gen. Docket No. 87-24, Appendices C1-C3 and D (filed July 22, 1987). This source also lists 16 text and data services.

[71] *Cablevision,* June 1, 1981, p. 54.

[72] *Comments of the National Cable Television Association* in Gen. Docket No. 87-24 at 56, note 102 (filed July 22, 1987) quoting Cable Data Corporation. Form 3 systems are the larger ones, with semiannual gross receipts of more than $292,00. They are the only ones required to report distant signal carriage as a separate category. *See* paras. 38-40 supr a.

[73] It is possible that many of the new systems started since 1980 chose to carry fewer distant signals than the older systems. To the extent that cable came later to areas with good over-the-air service, this is plausible. Moreover, some systems dropped certain distant signals in response to the Copyright Royalty Tribunal's new distant signal fees, which went into effect in 1983. *See infra* at para. 74.

[74] *See Notice of Inquiry* in Gen. Docket No. 86-336, 51 Fed. Reg. 30,267 (Aug. 25, 1986) at paras. 4-13 for a brief discussion of these developments.

[75] A recent subscriber count shows national satellite-delivered basic services with subscriber counts ranging from one million to 47.8 million. For pay services, the range is 490,000 to 15.9 million. (This excludes an "adult" service, offered primarily to home satellite dish owners, that has 27,000 subscribers). *See Cablevision,* Aug. 15, 1988, p. 65.

[76] *Cablevision,* Mar. 14, 1988, p. 74. The total number of television households in 1976 was 71.1 million.

[77] *Broadcasting,* Feb. 6, 1989, p. 16.

[78] *Television Factbook,* Cable and Services Vol., p. A-41 (1987); p. 73-a (1977).

[79] *Television Factbook,* Cable and Services Vol., p. A-41 (1987). Comparable data for 1976 are not available.

[80] *See Second Report* in Gen. Docket No. 86-336, *supra* note 7, and the sources cited therein for a description of the development of the home satellite dish programming market.

[81] The Satellite Home Viewer Act of 1988, *supra* note 7.

[82] *Id.* at 3950, 3957. These provisions will appear in 17 U.S.C. 119 (a)(2)(B) and (d)(10). For information on satellite delivered broadcast signals, *see Second Report* in Gen. Docket No. 86-336, *supra* note 7, at paras. 68-73 and table 1. Prior to passage of the Satellite Home Viewer Act of 1988, Satellite Broadcast Networks (SBN), one of two carriers providing network signals, was the target of several lawsuits challenging its claim of entitlement to the compulsory license. One of those suits was decided against SBN. *See Broadcasting,* Aug. 22, 1988, p. 88 and Sept. 12, 1988, p. 90. The other provider of network signals, Netlink, had sought permission to retransmit the signals of network stations and, unlike SBN, only offered those signals to unserved households.

[83] *See infra* at paras. 151-152.

[84] *See Home Box Office v. FCC,* 567 F. 2d 9 (1977), *cert. denied,* 434 U.S. 829 (1977).

[85] *Quincy Cable TV, Inc. v. FCC,* 768 F. 2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.,* 106 S. Ct. 2889 (1986).

[86] *Must Carry Report and Order,* 1 FCC Rcd 864 (1986), *recon. denied,* 2 FCC Rcd 3593 (1987), *rev'd sub nom. Century Communications Corp. v. FCC,* 835 F. 2d 292 (D.C. Cir. 1987), *clarified,* 837 F. 2d 517 (D.C. Cir. 1988), *cert. denied,* 108 S. Ct. 2014 (1988).

[87] Cable operators who carry at least one distant signal may carry local signals without paying any royalty fees beyond those required by carriage of the distant signal or signals. Those cable operators who carry only local signals incur a small copyright liability with the first local signal carried. The carriage of additional local signals brings no increase in that payment. *See* the explanation of the royalty system *supra* at paras. 35-42.

[88] This is not to say that all cable systems will spend the same amount on carriage rights negotiations. In choosing the level of negotiations expenditures, cable systems will consider benefits in terms of increased subscriber revenues as well as costs. Thus, larger systems may spend more on rights negotiations, other things equal, than smaller ones. Nevertheless, for a given cable channel, while the royalty fee obviously will be much higher for a system with 100,000 subscribers than one with 1,000 subscribers, the cost of negotiating the deal is likely to be similar in each case.

[89] *See supra* at para. 54.

[90] *Television Factbook,* Cable and Services Vol., p. A-13 (1987). *Broadcasting,* Jan. 16, 1989, p. 18.

[91] This conclusion would not be altered in the event that cable operators negotiated directly with copyright holders for rights to some or all programming. In this case, transactions costs would be gauged by examining the number of programs for which a license is sought and the number of copyright holders with whom negotiations must be conducted. The number of programs per signal (roughly related to how many hours per day the station broadcasts) may have increased slightly, and the universe of program producers has also probably increased slightly, although the latter development does not necessarily mean that each system or station is dealing with a larger number of suppliers than before. Hence, the change in transactions costs over time is again dependent primarily on the increase in the number of local signals carried.

[92] The 1976 figures are from *Television Digest, NCTA Convention* Supplement, April 4-7, 1976 and *Television Factbook,* Cable and Services Vol., p. A-41 (1987). The figure for the top 50 MSOs is for March 1, 1976 and the total cable subscribership

figure is for January 1, 1976. The 1987 figures are from *Television Digest*, Nov. 30, 1987, pp. 2-3. Both the top 50 MSOs and total subscribership figures are for October 15, 1987.

[93] U.S. Department of Commerce. National Telecommunications and Information Administration, *Cable Retransmission of Broadcast Television Programs Following Elimination of the "Must Carry"* Rules, 33 (1985).

[94] *Television Factbook*, Cable and Services Vol., pp. A-36-A-38, A-41 (1987); p. 73-a (1977). The figures for large cable systems are for September 1, 1976 and April 1, 1987, respectively. The total subscribership figures used to calculate the percentages are for January 1, 1976 and January 1, 1987.

[95] In Section IV, *infra*, we discuss some of the different market arrangements that might arise under full copyright. Networking, for example, would economize on transactions costs by allowing program suppliers to sell to broadcast intermediaries, who would then license entire channels to cable systems. Blanket licensing arrangements might emerge for lower valued programs for which transactions costs were large relative to the royalty fees that could be charged, but such arrangements would differ from the compulsory license in that the level of rates would be set as a result of negotiations between buyers and sellers and not by a government agency.

[96] As currently applied to audiovisual works in most modes of distribution other than cable, full copyright liability allows copyright owners to receive market rates for exhibitions of their works. In general, consumers are well served by an unrestricted market when there are many providers of a good or service competing for the patronage of the public markets. Rivalry among a large group of producers (continually augmented by new entrants and depleted by the departure of the unsuccessful) spurs them to create programming desired by viewers, while the variation in compensation for different programs, a key aspect of the market system, transmits valuable information on consumer preferences and provides incentives to cater to those preferences. Competition also holds overall program prices down, although particularly popular material will certainly produce substantial revenues. Similarly, competition among distribution channels--cable television, broadcast television, cassette rental, home satellite dishes (to a limited extent), and, in the future, MMDS and DBS--benefits consumers by encouraging efficient program distribution and ensuring that consumer valuations of programming are transmitted as accurately as possible to program producers.

For analytic discussions of competition and consumer welfare, *see* J. Hirshleifer, *Price Theory and Applications* (2nd. ed.) 520-49; F. M. Scherer, *Industrial Market Structure and Economic Performance* (2d ed.) 9-44. For a discussion of FCC reliance on competition as a policy tool, *see Syndicated Exclusivity Report and Order, supra* note 14, at para. 4 and note 10.

[97] Comments of the Motion Picture Association of America (filed Aug. 6, 1987). Attachment A: "Statement of Stanley M. Besen on the Cable Compulsory Copyright License" (hereinafter *Besen Statement)* at 38-39.

[98] Comments of Capital Cities/ABC, Inc. at 20 (filed Aug. 6, 1987) *(ABC Comments)*.

[99] *See supra* at para. 50. *See also Besen Statement, supra* note 97, at 10, note 22.

[100] According to figures compiled by Cable Data Corporation from cable system Statements of Account on file at the U.S. Copyright Office, there were 2.1 million subscribers in Form 1 systems and 5.1 million subscribers in Form 2 systems, out of a total of 35.8 million cable subscribers in the second six-months of 1985, which is the latest period for which such data are available.

[101] Comments of Major League Baseball at 6, note 8 (filed Aug. 6, 1987) *(MLB Comments)*.

[102] Comments of the Association of Independent Television Stations, Inc. at 6 (filed Aug. 6, 1987) *(INTV Comments)*. It should be noted that the television station probably reaches more households than the cable systems do, which would lead to a higher rate paid by the station. The station derives its revenues from the programming by selling advertising, while the cable systems derives its revenue from subscription fees. The net effect of these factors on the relative prices paid for programming by the independent station and local cable operators is not clear. However, it seems unlikely that they would lead to the extreme divergence cited in the comments.

[103] *Testimony of Allen R. Cooper, supra* note 60.

[104] *See, e.g., Cablevision*, Mar. 28, 1983, p. 14. Twenty-seven Group W systems dropped at least one distant signal "in order to avoid passing on to our customers the substantial costs of carrying those signals." Storer Cable Communications dropped 85 signals in 66 markets, noting that this would save "several million dollars" in royalty payments each year. Also, a 1983 survey by NCTA, which yielded responses from 25 of the top 30 MSOs, suggested that 4 million subscribers served by 253 cable systems would lose one or more distant signals. A total of 396 signals were dropped by at least one system. *See* Shooshan and Jackson, Inc. *The U.S. Copyright Royalty Tribunal: An Unsuccessful Experiment in Cable Copyright Regulation*, at 19 (March 1985).

[105] *See supra* note 16.

[106] *See supra* note 97.

[107] *Id.* at i-ii.

[108] Appendix B contains a stylized example, drawn from the *Besen Statement, supra* not 97, that illustrates the negative effects of the compulsory license on incentives to supply programming.

[109] *See Besen Statement, supra* note 97, at 16-29. Some of the other concerns mentioned in this submission will be obviated when our new syndicated exclusivity rules take effect. *See Syndicated Exclusivity Report and Order, supra* note 14.

[110] *See Syndicated Exclusivity Report and Order, supra* note 14, at paras. 76-89.

[111] *Besen Statement, supra* note 97, at 17.

[112] The gross value of the distant signal is lower; its value to consumers net of revenues paid the cable operator is lower; and its value net of the market price paid to the program supplier is lower.

[113] *Besen Statement, supra* note 97, at 19- 21.

[114] *Id.* at 21.

[115] *ABC Comments* at 21-22.

[116] The right to insert local ads would be a normal part of the bargaining process in those cases where cable operators deal directly with distant signal broadcasters. Networks formed to economize on transactions costs would very likely offer a combination of national ads and local spots much as current broadcast and cable networks do; although the possibility exists as well to forego advertising and charge subscribers directly as premium channels now do. The point is that the compulsory license dictates a particular set of arrangements, whereas full copyright allows the market to determine the most efficient arrangements.

[117] *NCTA Comments* at 7-8.

[118] *See* FCC Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership, and Regulation*, Background Report on "An Analysis of Television Program Production, Acquisition and Distribution," 545-62 (1980) Vol. II. *See*

also U.S. Department of Commerce, National Telecommunications and Information Administration. *Telecom 2000: Charting the Course for a New Century*, 595 (1988).

[119] Cable industry, as opposed to Congressional, fears of limitations on access to broadcast programming should be understood against the background of the Commission's "siphoning" rules. These rules were in effect until 1977, when the D.C. Court of Appeals vacated them. These rules had placed stringent limits on the ability of cable systems to acquire programming such as sports events and feature films for exhibition on pay channels. *See Home Box Office v. FCC*, 567 F 2d 9 (1977), *cert. denied*, 434 U.S. 829 (1977).

[120] *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 94th Cong., 1st Sess. 497 (1975).

[121] *Copyright Law Revision: Hearings on S. 1361 Before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary*, 93rd Cong., 1st Sess. 406 (1973).

[122] *Copyright/Cable Television: Hearings on H.R. 1805, 2007, 2108, 3528, 3530, 3560, 3940, 5870, and 5949 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 97th Cong., 1st and 2nd Sess. 703 (1982).

[123] *Id.* at 704.

[124] *Supra* note 72.

[125] *Supra* note 77.

[126] Comments of Cole, Raywid, and Braverman at 5.

[127] *Turner Comments* at 15.

[128] *NCTA Comments* at 13, note 19.

[129] *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F. 2d 125 (1982), *cert. denied*, 103 S. Ct. 1232 (1983).

[130] Major League Baseball, along with professional football, basketball, and hockey, has been granted an exemption from the federal antitrust laws for certain agreements covering telecasting of their games. *See* 15 U.S.C. 1291-95. This exemption may be relevant to agreements limiting the territory within which regional sports networks can be distributed.

[131] Terranova, *Cable's ballgame: from peanuts to crackerjacks*, Television Radio Age, April 18, 1988, p. 52. Of the 20 teams listed in this compilation, two (the Atlanta Braves and the Chicago Cubs) utilize superstations as their means of cable distribution. In the case of another five, the local television station that carries their games that have been licensed for broadcast has been made into a superstation. These five teams also have directly-negotiated cable packages of some of their other games.

[132] *Broadcasting*, Jan. 9, 1989, pp. 43-44.

[133] Reply Comments of Turner Broadcasting, Inc. at 8 (filed Oct. 5, 1987).

[134] *Television Digest*, Mar. 14, 1988, at 6.

[135] Joint Comments of the National Basketball Association and the National Hockey League at 2 (filed Aug. 6, 1987).

[136] *Broadcasting*, May 23, 1988, at 44.

[137] The recently-passed Satellite Home Viewer Act of 1988, *supra* note 7, at 3955, 3949-50, 3957, provides satellite carriers a compulsory license to retransmit television broadcast signals for private home viewing. The license applies both to independent television stations and to network affiliates, but for network stations it is limited to unserved households.

[138] This is not to say that producers might not choose to grant exclusive distribution rights for some programming. The point is that broadcasters who purchase such rights have no incentive to refuse cable retransmission consent, as long as a mechanism is available for securing compensation. Purchasing exclusive rights does not generally lead stations to limit availability of their signal. It reflects a business judgment that it is advantageous to exhibit certain programming without duplication on rival channels.

[139] Competition among program suppliers is what economists call "monopolistic competition," in contrast to pure competition or pure monopoly. Because each program is unique, its supplier enjoys a "monopoly" and has some flexibility in setting its price and terms of distribution. As in pure competition, however, the existence of a larger number of sellers offering unique but similar products tends to keep profits at a competitive rather than at a monopoly level.

[140] *See supra* at paras. 63-64.

[141] *See* Appendix D for a list of commenters.

[142] *NCTA Comments* at 9-13. Comments of the Coalition of Small Cable Televison System Operators at 2-6 (filed Aug. 6, 1987). Comments of National Public Radio at 5-9 (filed Aug. 6, 1987). *Turner Comments* at 10.

[143] *See, e.g.*, Comments of Tempo Enterprises, Inc. at 2-3 (filed Aug. 6, 1987), Comments of Cole, Raywid, and Braverman at 7, *Turner Comments* at 14. A few commenters raise the possibility that cable operators would be foreclosed from access to broadcast programming in the absence of a compulsory license, an issue treated *supra* at paras. 92-105. As noted *supra* at para. 15, we believe that the utility of the compulsory license must be assessed by comparing how the viewing public fares with and without it. The presence of healthy broadcasting and program production industries is not sufficient to establish that consumers are better off with the compulsory license. Thus, information about the financial health of these industries is not directly relevant to our analysis.

[144] *See NCTA Comments* at 8; Comments of the Coalition of Small Cable Television System Operators at 2-3 (this commenter also asserts that the transactions cost burden is particularly heavy for small systems); *Turner Comments* at 10; *TCI Reply Comments* at 12.

[145] *NCTA Comments* at 11, note 15.

[146] *See, e.g.*, Comments of Joseph S. Gans, Inc., at 3-5 (filed Aug. 6, 1987), Comments of Cole, Raywid and Braverman at 5.

[147] *Turner Comments* at 13. Comments of the Coalition of Small Cable Television System Operators at 4. *TCI Reply Comments* at 15-16.

[148] Comments of Richard S. Leghorn at 11-13 (filed Aug. 6, 1987).

[149] Comments of Henry Geller and Donna Lampert at 1, *et seq.*; Appendix A at 10 (filed Aug. 6, 1987). In essence, this would raise the rates to infinity for cable systems in the top 100 markets.

[150] *MLB Comments* at 2-10.

[151] This suggestion, a measure to prevent a fall in rate levels, is now moot, since the decision has now been overturned on appeal. *See supra* at para. 42.

[152] The fourth point is beyond the scope of this report.

[153] Comments of the U.S. Copyright Office at 11-12 (filed June 22, 1987).

[154] Some commenters propose retaining the compulsory license for local signals only, in the event that must carry rules are reinstituted. *See INTV Comments* at 4-10. Comments of CBS, Inc. at 17-18 (filed Aug. 6, 1987). Comments of the Motion Picture Association of America at 18-21 (filed Aug. 6, 1987) (*MPAA Comments*).

[155] *NTIA Comments* at 12-16.

[156] *ABC Comments* at 11. For a similar suggestion, *see Besen Statement*, *supra* note 97 at 31, note 38. He refers to "specialized agents" employed by program suppliers to negotiate with cable systems, and analogizes them to program syndicators.

[157] *MPAA Comments* at 17.

[158] *MPAA Comments* at 17 and Comments of the Motion Picture Association of America, Inc. in Gen. Docket. No. 87-24 at 24-25 (filed July 22, 1987). The latter reference is also cited by ABC in its discussion of the viability of nonbroadcast regional cable services as substitutes for regional superstations. *ABC Comments* at 10.

[159] *NTIA Comments* at 14.

[160] *MPAA Comments* at 16-18.

[161] *ABC Comments* at 7-11.

[162] Reply Comments of the National Cable Television Association, Inc. at 6 (filed Oct. 5, 1987). *See also NCTA Comments* at 11, note 15.

[163] Moreover, as the Commission's recently-enacted *Syndicated Exclusivity Report and Order* suggests, workable mechanisms are available for holders of exclusive program exhibition licenses to notify cable operators in good time of their obligations under the rules. This document also suggests that, should they be needed, mechanisms are likely to become available for providing substitute programming to replace any that must be blacked out. Such mechanisms will probably develop regardless of whether any action is taken to modify the compulsory license. *See Syndicated Exclusivity Report and Order supra* note 14, at paras. 76-88, 97-99, and 106-107.

[164] *NCTA Comments* at 11.

[165] Comments of the American Society of Composers, Authors and Publishers, Broadcast Music, Inc. and SESAC, Inc. (filed Aug. 6, 1987) (*ASCAP et al. Comments).*

[166] *Id.* at 12.

[167] *ABC Comments* at 11.

[168] *See Buffalo Broadcasting Co., Inc. v. ASCAP*, 744 F.2d 917 (2d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

[169] 17 U.S.C. 111(d)(5)(A).

[170] Comments of Time, Inc. at 18.

[171] *Turner Comments* at 21.

[172] Reply Comments of the American Society of Composers, Authors, and Publishers, Broadcast Music, Inc., and SESAC, Inc. at 1-4 (filed Oct. 5, 1987).

[173] 17 U.S.C. 118.

[174] 17 U.S.C. 111 (d) (5).

[175] *Besen Statement*, *supra* note 97, at 30-31.

[176] *Id.*

[177] This requires competition among networks, but there are many available on cable. *See supra* at para. 53.

[178] 17 U.S.C. 111(d)(2)(B) and 111(f). The distinction in the statute between distant and local signals is based on the Commission's must-carry rules that were in effect on April 15, 1976.

[179] As noted, *supra* at para. 39, Form 1 and Form 2 cable systems pay royalties based solely on gross receipts, regardless of the number of signals--distant or local--retransmitted. Form 3 systems that transmit no distant signals nevertheless pay a fee "for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter . . . " 17 U.S.C. 111(d)(2)(B)(i).

[180] *See supra* at para. 53.

[181] *Communications Daily*, April 28, 1988, p. 7.

[182] *Broadcasting*, May 23, 1988 at 32.

[183] *Id.*

[184] In our recent syndicated exclusivity proceeding, we modified our territorial exclusivity rules to permit broadcast stations to purchase exclusive, as well as non-exclusive national broadcast rights to programming. By purchasing either type of national broadcast rights to programming, a superstation can ensure that cable systems carrying its signal will not be subject to requests from local broadcasters to black out that programming, pursuant to our syndicated exclusivity rules. *See Syndicated Exclusivity Report and Order*, *supra* note 14, at paras. 163-170.

[185] *Broadcasting*, Feb. 6, 1988, p. 31.

[186] U.S. Department of Commerce, National Telecommunications and Information Administration, Office of Policy Analysis and Development, *Cable Copyright: Alternatives to the Compulsory License* (December 1981). *See especially* pp. 83-136.

[187] *Multichannel News*, Jan. 2, 1989, p. 28.

[188] WTBS has 45.1 million, WGN has 24.7 million, and WPIX has 9.7 million. KTVT, at 3.6 millon, is above the level that WOR had achieved in 1979. *See Cablevision*, Aug. 15, 1988, p. 65.

[189] The Commission considered the issue of program duplication in the syndicated exclusivity proceeding, concluding that, with syndicated exclusivity rules, the market would provide the desired level of duplication/time diversity. *See Syndicated Exclusivity Report and Order*, *supra* note 14, at paras. 49-89. Elimination of the compulsory license would provide the same flexibility via producer exercise of copyright rights rather than syndicated exclusivity rights.

[190] This would require additional negotiations for the exhibition of commercials and to obtain rights to any components of the local programming for which the station did not hold the copyright.

[191] *Cablevision*, May 18, 1987, p. 21.

[192] *See supra* at paras. 38-40.

[193] *House Report*, *supra* note 8, at 90. If this means that when copyright owners license local stations to carry a program, they expect that it will reach all local television households and charge accordingly, then the implication is that a local station planning to sell its "program service" would likely have to undertake little additional negotiation with copyright owners. Program contracts frequently include prohibitions on retransmission, a prohibition that the compulsory license currently overrides in the case of cable. The presence of such prohibitions does not mean, however, that under full copyright liability copyright holders would be unwilling to grant cable retransmission rights.

[194] *See* Cabletelevision Advertising Bureau, *Cable TV Facts* (1988) at 11, citing the Nielsen Television Index Cable TV Status Report. The Nielsen data distinguish between local and distant independent stations. While there is no breakdown of local and distant network affiliates or public stations, it is likely that most such stations are local. The Nielsen shares sum to 106 percent, due to second set viewing; the figure in the text corrects for this. It is calculated by summing the relevant shares and dividing by 1.06.

[195] For example, *Multichannel News* reports that there are 48,637,000 cable households, and that USA, WTBS, and ESPN have 46,400,000, 47,900,000, and 49,900,000 subscribers, respectively. *Multichannel News*, Jan. 2, 1989, p. 28; and Jan. 9, 1989, p. 29. The percentage of cable households reached are 95.4, 98.5, and over 100, respectively. The last figure is presumably a consequence of the inclusion of some subscribers, perhaps

served by SMATV or MMDS, that are not cable households. In any event, it is clear that the penetration of cable households by these services is quite high. The fourth quarter 1988 prime time rating for USA network was 2.1. For ESPN, it was 2.5, and for WTBS, it was 2.6. These were the three highest-rated cable services for this period. *Broadcasting*, Jan. 9, 1989, p. 96. While the figures on penetration and ratings may be explained in part by strong demand for these services by a relatively small fraction of cable viewers, they also suggest that the ratings threshold needed to achieve cable carriage is fairly low.

[196] This is a national average. *See supra* note 77.

[197] We cannot, of course, rule out the possibility that a copyright holder may offer a station only local broadcast rights to a program, preferring to sell cable rights directly to a cable network. In this event, the local station would be faced with the choice of declining to carry that particular program or carrying it and offering a reduced schedule to local cable operators.

[198] *See supra* note 154.

[199] For a description, see Larry Jaffe, Bill Links Must-carry, Compulsory License, Multichannel News, April 4, 1988, p. 10. Congressman Bryant introduced a similar bill in the current session of Congress. *See Broadcasting*, Jan. 30, 1989, p. 14.

[200] *See Broadcasting*, June 20, 1988, p. 44.

[201] Economic theory suggests that, in situations that depart from the optimal in more than one respect, correcting a single defect may reduce rather than increase consumer welfare. In other words, harmful distortions may sometimes cancel each other out in part. This line of analysis is known as the "theory of the second best." See F. M. Scherer, Industrial Market Structure and Economic Performance, supra note 96, at 24-29.

[202] In this section, we do not consider costs copyright holders incur by virtue of the divergence of the compulsory license royalty rates from market rates.

[203] *ABC Comments* at 6, note 9; *ASCAP et al. Comments* at 10; Comments of the Canadian Broadcasting Corporation (CBC) at 3-4 (filed June 22, 1987); *Comments of MLB* at 2-5. Unlike the others, CBC supports the compulsory license. However, CBC complains about the high transactions costs associated with it.

[204] While MLB "historically has not supported compulsory licensing," its comments comprise recommendations on ways that the compulsory license could be improved "if the cable compulsory license is to remain." *MLB Comments* at 1-2. *See supra* at para. 122 for a summary of these suggestions.

[205] *Id.* at 2-3.

[206] *Id.* at 4. The *Cablevision* case, discussed, *supra*, at para. 42, is one recent example.

[207] *MLB Comments* at 2.

[208] *See Annual Report of the Copyright Tribunal* (fiscal years 1980-82 and 1985-87) and Copyright Royalty Tribunal *Sunshine Act Report* (calendar years 1978-79, 1984) for 1978-82 and 1984-87 data. *See 1980 Cable Royalty Distribution Determination*, *supra* note 58, for 1983 data. Distribution proceedings for a given year are undertaken and completed in later years.

[209] *See* table 2 in Appendix C for information on cable royalty fund contributions to the budgets of the Copyright Office and the CRT.

[210] *NTIA Comments* at 10. *See also ASCAP et al. Comments* at 10.

[211] Table 3 in appendix C provides information on the timing of disbursements from the cable television royalty funds. We mean to advance no criticism whatsoever of the CRT. That agency is following an inherently difficult statutory mandate. To carry it out in a fair and equitable manner requires a significant effort.

[212] It should be noted, however, that royalty funds are held in interest-bearing accounts and that the interest is distributed to copyright claimants along with the cable operator payments. 17 U.S.C. 111(d)(3).

[213] The 1986 distribution proceeding, now in progress, is worth examining to get a sense of the nature of the process. As described in the text, the CRT declared a controversy in this proceeding on April 18, 1988. This declaration, which applies to both Phase I and Phase II of the proceeding, was followed by a partial distribution of royalty funds. It is possible that the copyright claimants will come to a settlement agreement before the CRT's distribution proceeding begins, or while that proceeding is in progress. Should a settlement *not* be reached, Phase I litigation will proceed according to the following schedule. A four-month period from August 5 to December 5 of 1988 has been set aside. The schedule provides for three weeks of hearings on Phase I "direct cases" and one week of hearings on "rebuttal cases." The parties to the proceeding file written direct cases, written rebuttal cases, Proposed Findings of Fact and Conclusions of Law, as well as Reply Proposed Findings of Fact and Conclusions of Law. There are also provisions for two "discovery periods" and opportunities for parties to file "motions for underlying documentation." After a decision is reached, the CRT would move on to the Phase II portion of the proceeding, which would have its own schedule. *See Order* in CRT Docket No. 88-2-86CD, April 21, 1988.

[214] This is true notwithstanding the procedures that copyright claimants have developed over time to reduce the costs of the system.

[215] *Supra* note 14, at paras. 106-107. *See also* 4 FCC Rcd 2711 (1989), at paras. 61-62.

[216] *Supra* note 7.

[217] 17 U.S.C. 119 (c)(2)(B).

[218] Comments of the U.S. Copyright Office at 11-12.

[219] This figure is drawn from a survey by the National Cable Television Association. An independent survey of 25 cable systems by *Multichannel News* found an average of $13.12. *See Second Report* in Gen. Docket No. 86-336, *supra* note 7, at para. 43.

[220] *See supra* at para. 39. Form 1 and Form 2 systems incur their full copyright liability with the first broadcast signal (including local signals) that they carry. Form 1 systems pay a flat rate of $4.67 per month. A small system with, for example, 200 subscribers would thus pay $0.023 per subscriber per month for *all* broadcast signals carried. A Form 2 system of intermediate size (gross receipts of $146,000 per six months, equivalent to 1,856 subscribers at the 1987 average basic rate) pays $0.066 per subscriber per month for *all* broadcast signals carried. The comparable figure for a Form 2 system of maximum size (gross receipts of $292,000 per six months, equivalent to 3,712 subscribers) is $0.098 per subscriber per month for *all* broadcast signals carried.

[221] We recognize that, for some *local* signals, the market price of cable retransmission rights may be zero, or even negative (*i.e.*, in some cases less popular broadcast stations might end up paying for cable carriage, a situation that could also arise today under the compulsory license.)

[222] Pursuant to our discussion *supra* at paras. 163-164, should a set of must carry rules be adopted by Congress, we would recommend that Congress consider the implications of this for the compulsory license for local stations.

[223] It is based on U.S. Copyright Office, "Statement of Account for Secondary Transmissions by Cable Systems" (Long Form)--SA3.

[224] These figures, which pertain to the second half of 1987 accounting period, were supplied by staff of the Licensing Division of the Copyright Office.

[225] *See* the discussion *supra*, at para. 42. Had the definition of gross receipts proposed by Cablevision remained in force, royalty payments (which are figured as percentages of gross receipts) would have been reduced, perhaps substantially. (Some estimates placed the prospective reduction as high as 50 percent.)

[226] *Besen Statement, supra* note 97, at 10 *et seq.*

STATEMENT OF CHAIRMAN DENNIS R. PATRICK ON THE CABLE COMPULSORY LICENSE

The Commission has made reliance upon competitive enterprise and free markets the keystone of its program to promote the public interest and to ensure that consumers' desires for a diverse menu of video programming are well served. The evidence adduced in the course of this thoroughgoing investigation strongly suggests that the compulsory copyright license impedes the efficient functioning of the market and its ability to make consumers sovereign. The compulsory license inhibits the free flow of information about consumers' tastes and programming preferences and weakens the incentives of producers to respond to such information. Moreover, by subsidizing program acquisition by cable systems, the compulsory license introduces a significant bias into the program distribution system, disadvantaging competitive alternatives to cable.

Many in Congress have expressed their concern over the strength of the cable industry. Recently some have even gone so far as to characterize cable as a monopoly. While I believe that our program delivery system is now more effectively competitive than ever, our staff's enquiry in this proceeding indicates that the compulsory license is a significant impediment to full and fair competition, and that its elimination by Congress would advance the public interest.

With respect to local broadcasters, the absence of must carry and the presence of the compulsory license constitutes the worst of all possible worlds. Cable can acquire broadcast programming at bargain rates without permission, but broadcasters have no guarantee of access. Full copyright liability would redress this imbalance, allowing local stations to reap additional rewards for their productive efforts, but leaving them the flexibility to bargain for carriage with cable systems that have no current obligation to retransmit broadcast signals. Nevertheless, the key point about our recommendation today is the elimination of the compulsory license would benefit consumers. It is on this basis that I support it, and on this basis that I hope that the Congress will give it serious consideration.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO CONCURRING IN PART AND DISSENTING IN PART

Re: Report on the Compulsory License for Cable Retransmission of Broadcast Signals (General Docket No. 87-25)

Consistent with my initial statement in this proceeding, I am concurring with that portion of the report recommending that Congress repeal the compulsory license for distant signals. Furthermore, I am dissenting to the recommendation that the compulsory license be repealed for local broadcast signals, or in other words, I recommend maintaining the compulsory license for local broadcast signals. In the best of all possible worlds, I would recommend that Congress first address the issue of must-carry. However, in the event Congress does not reimpose must-carry rules, I would then recommend elimination of the compulsory license for local broadcast signals.

I am concerned that with full copyright liability cable operators will have an additional variable to consider when making their determination whether to carry local signals – the cost associated with retransmitting broadcast signals. It is conceivable that under full copyright liability cable operators may choose not to carry local broadcast signals due to the costs of programming retransmission rights. The report does not analyze the cost of full copyright liability on the individual consumer.

I will agree that absent must-carry rules and with compulsory license, the cable industry is enjoying a free ride at broadcasters' expense, and this cannot continue indefinitely. Rather than recommending that Congress eliminate the compulsory license, I would prefer recommending that Congress first consider reinstituting must-carry rules. The report states that in the event must-carry rules are reimposed compulsory license also would have to be reimposed. If Congress acts on the Commission's recommendation to eliminate compulsory license before addressing the must-carry issue and then decides to reimpose must-carry rules, then Congress may find itself with the task of reimposing both rules.

I also want to go on record disavowing myself from the economic analysis attempting to demonstrate that transactions costs on a per-subscriber basis are less today than in 1976. By distributing transactions costs across cable subscribers you have to take into consideration the increase in the total number of cable subscribers since 1976. Holding cable subscribers constant, transactions costs may have actually increased over the years. The economic analysis of transactions costs may lead one to conclude that such costs associated with the current scheme of distributing copyright royalties may undermine the rationale used by Congress to impose compulsory license in the first place – the transactions costs under full copyright liability would be too burdensome.

I also disassociate myself from what could be interpreted as criticisms lodged against Congress and the Copyright Royalty Tribunal.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application of

GENERAL TELEPHONE
COMPANY OF
CALIFORNIA

For authority pursuant to Section 214 of the Communications Act of 1934 and Sections 63.01 and 63.57 of the Commission's rules and regulations, to construct and maintain broadband transport facilities in Cerritos, California; File No. W-P-C-5927

and

For authority pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and Regulations to construct, operate and maintain broadband transport fiber optic facilities in Cerritos, California. File No. W-P-C-6250

ERRATA

Released: July 26, 1989

The Commission's Memorandum Opinion Order, and Authorization in File Numbers W-P-C-5927 and W-P-C-6250 (FCC 89-127) released July 17, 1989, contained errors in paragraph 61.b. and 61.b.(2) which hereby are revised as follows:

b. General shall submit to the Chief, Domestic Services Branch, Common Carrier Bureau on March 30, 1990, and on that date of each year thereafter for the previous calendar year, a comprehensive written report discussing the following matters, in the order designated:

(1) * * *

(2) Total number of hours of operation of the Cerritos coaxial cable and fiber systems and the amount of bandwith employed;

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application to Modify
License WNLS 525 and
Request for Waiver by
William Ryder

ORDER

Adopted: August 8, 1989; Released: September 7, 1989

By the Chief, Land Mobile and Microwave Division:

I. INTRODUCTION

1. On June 29, 1989, William Ryder (the licensee) submitted to the Private Radio Bureau a request for waiver of certain licensing procedures for Specialized Mobile Radio (SMR) systems licensed in the 896-901/935-940 MHz bands (900 MHz band).[1] The licensee is authorized to operate a 900 MHz SMR station, WNLS 525, providing coverage within the Tampa/St. Petersburg Designated Filing Area.[2] He requests a waiver of the requirement that a 900 MHz SMR primary base transmitter site be constructed within the DFA for which the license is granted.[3] He seeks the waiver because he desires to relocate his system's primary base transmitters to Palmetto, Florida. Palmetto is located outside the Tampa/St. Petersburg DFA.[4] We deny the licensee's request for waiver because the licensee has failed to demonstrate that unique circumstances are involved and that there is no reasonable alternate solution under our rules.[5]

II. REQUEST

2. The licensee seeks permission to modify his license, WNLS 525, to relocate the system's primary base transmitters to an antenna site in Palmetto, Florida, in Manatee County (modified site). Manatee County is not part of the Tampa/St. Petersburg DFA nor of any other DFA. The modified site is approximately five miles from the closest boundary of the Tampa/ St. Petersburg DFA. The licensee states that the modified site would allow significantly improved coverage within the DFA. Further, he contends that no other existing site within the DFA would provide greater coverage than this site outside the DFA. Currently, the modified site is utilized by a paging business providing paging service to both Tampa and St. Petersburg customers. The licensee argues that a waiver in this case is consistent with our policy[6] because the site is a *de minimus* distance from the DFA boundaries and serves the primary service area of the Tampa/St. Petersburg DFA.

III. DISCUSSION

3. A waiver of our rules or procedures is not warranted unless the licensee establishes that unique circumstances are involved and that there are no reasonable alternate solutions under our existing rules.[7] The licensee asserts that the modified site will provide improved coverage to Tampa and St. Petersburg. He states that existing sites within Hillsborough County are not reasonable alternatives because such sites do not provide coverage as good as the modified site.[8] The licensee, however, fails to establish any unique circumstances in this case. He indicates no faults with his current site. For example, the licensee cites no geographical impediment that prevents service to Tampa and St. Petersburg from his current site. The licensee presents no evidence to substantiate his claim that "significantly improved coverage" would be allowed from the modified site. Nor does he provide us with information sufficient to determine whether improved coverage means, for example, an increase in land mass covered, an increase in the population covered, or an increase in signal strength to the areas currently covered by his system. Accordingly, we find no unique circumstances to convince us that a waiver is justified in this case.[9]

4. The licensee correctly states that a waiver of our licensing procedures might be warranted if a modified site was an existing transmitter site that provided service to the heart of the urban center and the site was a *de minimus* distance from the DFA boundary.[10] The fact that such a site can be found, however, does not relieve the licensee of showing that unique circumstances exist that prevent it from using a site within the DFA. In any case, we do not regard "approximately five miles" from the DFA boundary as a *de minimus* distance.

IV. CONCLUSION

5. IT IS THEREFORE ORDERED that the licensee's request for a waiver of the 900 MHz SMR licensing procedure that requires a primary base station be constructed within the DFA for which the license is granted is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

RICHARD J. SHIBEN
Chief, Land Mobile and
Microwave Division

FOOTNOTES

[1] *See* Public Notice, Private Land Mobile Application Procedures for Spectrum in the 896-901 MHz and 935-940 MHz Bands, 1 FCC Rcd 543 (1989).

[2] Applications for 900 MHz SMR systems were to be accepted initially only in 50 designated urban centers to expedite service to the areas most in need of additional communications capacity. Report and Order, Amendment of Parts 2, 15, and 90 of the Commission's Rules and Regulations to Allocate Frequencies in the 900 MHz Reserve Band for Private Land Mobile Use, 2 FCC Rcd 1825, 1835, App. B (1986). Although the 50 urban centers were defined as the area within a 100-mile radius of the geo-

graphic center of each urban center, in order to further expedite service to the more densely populated areas, we developed Designated Filing Areas (DFAs) drawn to approximate each urban center's Primary Metropolitan Statistical Area and to reflect the relevant economic markets of each urban center. We permitted entities wanting to construct a system within these specified areas to apply for a license.

[3] Public Notice, 1 FCC Rcd at 545.

[4] The Tampa/St. Petersburg DFA includes the counties of Hernando, Hillsborough, Pasco and Pinellas. Palmetto is in Manatee County.

[5] *See* 47 C.F.R. § 90.151(a).

[6] *See* Order, In the Matter of Application to Modify License WNIX 518 and Request for Waiver by Environmental Exploration Corp., 4 FCC Rcd 2651, 2652 (1989); Order, In the Matter of Application to Modify License WNKM 964 and Request for Waiver by Sharon Mutter, 4 FCC Rcd 2654, 2654 (1989)(A waiver of the required location of a 900 MHz SMR system's base transmitter within a DFA might be warranted if an existing site was a *de minimus* distance from the DFA boundary and provided service to the heart of the urban center).

[7] *See* 47 C.F.R. § 90.151(a).

[8] The current site is in Pinellas County.

[9] The lack of any faults with the current site also suggests that his current site is a reasonable alternate solution under our existing rules.

[10] *See* footnote 6, *infra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-139

In the Matter of

Reorganization and Deregulation
of Part 97 of the Rules Governing
the Amateur Radio Services.

ERRATA

Released: September 7, 1989

The *Report and Order*, 4 FCC Rcd 4719 (1989), in the above entitled matter is corrected as follows:

1. In the Index to Part 97--Amateur Radio Service, Section 97.115 "Third-party traffic." is corrected to read "97.115 Third party communications."

2. In the Index to Part 97--Amateur Radio Service, Section 97.309 "RTTY and data emission digital codes." is corrected to read "RTTY and data emission codes."

3. In Section 97.5(d)(2), the word "form" is corrected to read "Form."

4. The final word in Section 97.5(d)(5) is corrected to read "licensee."

5. In Section 97.15(b)(2), remove the word "longer" and substitute therefor the word "shorter."

6. The present text of Section 97.109 is removed and the following text is substituted therefor:

§ 97.109 Station control.

(a) Each amateur station must have at least one control point.

(b) When a station is being locally controlled, the control operator must be at the control point. Any station may be locally controlled.

(c) When a station is being remotely controlled, the control operator must be at the control point. Any station may be remotely controlled.

(d) When a station is being automatically controlled, the control operator need not be at the control point. Only stations transmitting RTTY or data emissions on the 6 m or shorter wavelength bands, and stations specifically designated elsewhere in this Part may be automatically controlled. Automatic control must cease upon notification by an EIC that the station is transmitting improperly or causing harmful interference to other stations. Automatic control must not be resumed without prior approval of the EIC.

(e) No station may be automatically controlled while transmitting third party communications, except a station retransmitting digital packet radio communications on the 6 m and shorter wavelength bands. Such stations must be using the American Radio Relay League, Inc. *AX. 25 Amateur Packet - Radio Link - Layer Protocol, Version 2.0*, October 1984 (or compatible). The retransmitted messages must originate at a station that is being locally or remotely controlled.

7. In Section 97.119, correct paragraph (3) of paragraph (b) and paragraph (c) to read as follows. Also, remove paragraph (g) of this section.

§ 97.119 Station identification.

* * * * *

(b) * * *

(1) * * *

(2) * * *

(3) By a RTTY emission using a specified digital code when all or part of the communications are transmitted by a RTTY or data emission;

* * * * *

(c) An indicator may be included with the call sign. It must be separated from the call sign by the slant mark or by any suitable word that denotes the slant mark. If the indicator is self-assigned, it must be included after the call sign and must not conflict with any other indicator specified by the FCC Rules or by any prefix assigned to another country.

* * * * *

8. Section 97.207(c) is corrected to read as follows:

§ 97.207 Space station.

* * * * *

(c) The following frequency bands and segments are authorized to space stations:

(1) The 17 m, 15 m, 12 m, and 10 m bands, 6 mm, 4 mm, 2 mm and 1 mm bands; and

(2) The 7.0-7.1 MHz, 14.00-14.25 MHz, 144-146 MHz, 435-438 MHz, 1260-1270 MHz, and 2400-2450 MHz, 3.40-3.41 GHz, 5.83-5.85 GHz, 10.45-10.50 GHz, and 24.00-24.05 GHz segments.

* * * * *

9. Section 97.209(b)(1) is corrected to read:

§ 97.209 Earth station.

* * * * *

(b) The following frequency bands and segments are authorized to Earth stations:

(1) The 17 m, 15 m, 12 m, and 10 m bands, 6 mm, 4 mm, 2 mm and 1 mm bands; and

* * * * *

10. Section 97.211(c)(1) is corrected to read:

§ 97.211 Telecommand station.

* * * * *

(c) The following frequency bands and segments are authorized to telecommand stations:

(1) The 17 m, 15 m, 12 m and 10 m bands, 6 mm, 4 mm, 2 mm and 1 mm bands; and

* * * * *

11. In Section 97.211(c)(2), remove the semicolon and substitute a period therefor.

12. In Section 97.301, paragraph (a) is corrected by changing the first entry in the UHF wavelength band table; paragraph (c) is corrected by changing the ninth entry in the HF wavelength band table; and paragraph (d) is corrected by changing the second, third, and ninth entries in the HF wavelength band table, as follows:

§ 97.301 Authorized frequency bands.

* * * * *

(a) * * *

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing requirements *See* § 97.303, Paragraph:
* * * * *				
UHF	**MHz**	**MHz**	**MHz**	
70 cm	430-440	420-450	420-450	(a), (b), (f)
* * * * *				

(c) * * *

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing requirements *See* § 97.303, Paragraph:
* * * * *				
HF	**MHz**	**MHz**	**MHz**	
* * * * *				
-Do-	21.225-21.450	21.225-21.450	21.225-21.450	
* * * * *				

(d) * * *

Wavelength band	ITU Region 1	ITU Region 2	ITU Region 3	Sharing requirements *See* § 97.303, Paragraph:
* * * * *				
HF	**MHz**	**MHz**	**MHz**	
* * * * *				
75 m	---	3.85-4.00	3.85-3.90	(a)
40 m	7.025-7.100	7.025-7.150	7.025-7.100	(a)
* * * * *				
15 m	21.025-21.200	21.025-21.200	21.025-21.200	
* * * * *				

13. In Section 97.303, paragraph (b), correct "24.05-24.24" to read "24.05-24.25."

14. In Section 97.303, paragraph (f)(4) correct "449.5-450 MHz" to read "449.75-450.25 MHz."

15. In Section 97.303, paragraph (k), add "GHZ" after "145.45-145.75."

16. In Section 97.303, paragaraph (n)(2), add "GHz" after "10.00-10.45."

17. In Section 97.305(c), the entries in the MF, HF, and VHF wavelength band tables are corrected to read as follows:

§ 97.305 Authorized emission types.

* * * * *

(c) A station may transmit the following emission types on the frequencies indicated, as authorized to the control operator, subject to the stanards specified in § 97.307(f) of this Part.

Wavelength band	Frequencies	Emission types authorized	Standards *See* § 97.307(f), paragraph:
MF			
160 m	Entire band	RTTY, data	(3)
-Do-	-Do-	Phone, image	(1), (2)
HF			
80 m	Entire band	RTTY, data	(3), (9)
75 m	Entire band	Phone, image	(1), (2)
40 m	7.000-7.100 MHz	RTTY, data	(3), (9)
-Do-	7.075-7.100 MHz	Phone, image	(1), (2), (9), (11)
-Do-	7.100-7.150 MHz	RTTY, data	(3), (9)
-Do-	7.150-7.300 MHz	Phone, image	(1), (2)
30 m	Entire band	RTTY, data	(3)
20 m	14.00-14.15 MHz	RTTY, data	(3)
-Do-	14.15-14.35 MHz	Phone, image	(1), (2)
17 m	18.068-18.110 MHz	RTTY, data	(3)
-Do-	18.110-18.168 MHz	Phone, image	(1), (2)
15 m	21.0-21.2 MHz	RTTY, data	(3), (9)
-Do-	21.20-21.45 MHz	Phone, image	(1), (2)
12 m	24.89-24.93 MHz	RTTY, data	(3)
-Do-	24.93-24.99 MHz	Phone, image	(1), (2)
10 m	28.0-28.3 MHz	RTTY, data	(4)
-Do-	28.3-28.5 MHz	Phone, image	(1), (2), (10)
-Do-	28.5-29.0 MHz	Phone, image	(1), (2)
-Do-	29.0-29.7 MHz	Phone, image	(2)
VHF			
6 m	50.1-51.0 MHz	RTTY, data	(5)
-Do-	-Do-	MCW, phone, image	(2)
-Do-	51.0-54.0 MHz	RTTY, data, test	(5), (8)
-Do-	-Do-	MCW, phone, image	(2)
2 m	144.1-148.0 MHz	RTTY, data, test	(5), (8)
-Do-	-Do-	MCW, phone, image	(2)
1.25 m	Entire band	RTTY, data, test	(6), (8)
-Do-	-Do-	MCW, phone, image	(2)

* * * * *

18. In Section 97.307, paragraphs (f)(5) and (6) are corrected to read, as follows:

§ 97.307 Emission standards.

* * * * *

(f) * * *

(5) A RTTY, data or multiplexed emission using a specified digital code listed in § 97.309(a) of this Part may be transmitted. The symbol rate must not exceed 19.6 kilobauds. A RTTY, data or multiplexed emission using an unspecified digital code under the limitations listed in § 97.309(b) of this Part also may be transmitted. The authorized bandwidth is 20 kHz.

(6) A RTTY, data or multiplexed emission using a specified digital code listed in § 97.309(a) of this Part may be transmitted. The symbol rate must not exceed 56 kilobauds. A RTTY, data or multiplexed emission using an unspecified digital code under the limitations listed in § 97.309(b) of this Part also may be transmitted. The authorized bandwidth is 100 kHz.

* * * * *

19. In Section 97.309, remove the title of the section "RTTY and digital emission codes." and substitute therefor "RTTY and data emission codes."

20. In Section 97.309, paragraphs (a)(1), (2), and (3) are corrected to read as follows:

§ 97.309 RTTY and digital emission codes.

(a) * * *

(1) The 5-unit, start-stop, International Telegraph Alphabet No. 2 code, defined in International Telegraph and Telephone Consultative Committee Recommendation F.1, Division C.

(2) The 7-unit code, specified in International Radio Consultative Committee Recommendation CCIR 476-2 (1978), 476-3 (1982), 476-4 (1986) or 625 (1986).

(3) The 7-unit code, defined in American National Standards Institute X3.4-1977 or International Alphabet No. 5, defined in International Telegraph and Telephone Consultative Committee Recommendation T.50 or in International Organization for Standardization, International Standard ISO 646 (1983), and extensions as provided for in CCITT Recommendation T.61 (Malaga-Torremolinos, 1984).

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-522

In re Applications of

V.O.B. INCORPORATED	File No. BPH-871102MH
IOWA RADIO LIMITED PARTNERSHIP	File No. BPH-871103MB
RICHARD and STEPHANIE HERMANN d/b/a DICK BROADCASTING, LTD.	File No. BPH-871104MD
WILLIAM B. ROTH	File No. BPH-871104MG

For Construction Permit for a
New FM Station on Channel 292A
Ankeny, Iowa

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 1989; Released: September 7, 1989

By the Review Board: MARINO (Chairman) and ESBENSEN.

1. On June 30, 1989, Iowa Radio Limited Partnership (IRLP) filed an Appeal pursuant to 47 C.F.R. §1.301 (a) (1) from Administrative Law Judge (ALJ) John M. Frysiak's dismissal of IRLP's application from this proceeding by *Memorandum Opinion and Order*, FCC 89M-1735, released June 27, 1989. In ordering IRLP's dismissal, the ALJ declared that:

> IRLP's failure to produce the requested documents, its stalls, evasiveness and equivocations constituted a serious default in the prosecution of its application. Its obvious intent was to thwart the competing applicants from conducting any meaningful examination of the IRLP application. Such behavior should not be countenanced.

Oppositions to IRLP's Appeal were filed by V.O.B. Incorporated (VOB), Dick Broadcasting, Ltd. (DBL), and the Mass Media Bureau. For the reasons set forth below, we affirm the ALJ's ruling which was fully justified because of IRLP's failure, over a three month period, to comply with specific discovery orders (despite its own counsel's agreements to produce requested documents).

2. *Background*. On May 17, 1989, a Joint Motion to Dismiss, which led to the instant ruling, was filed by VOB and DBL (Movants). Movants alleged that IRLP had failed to prosecute its application because IRLP had continually refused to comply with discovery requests in the above-captioned proceeding. Our review of the relevant pleadings reveals that all of the parties to this proceeding, including IRLP, had filed a joint motion for production of documents on January 17, 1989, relating to the ownership of the respective applicants, their integration proposals, and diversification status. On January 25, 1989, the ALJ released an *Order* (FCC 89M-253) granting the joint motion. On that same date, VOB filed a supplemental motion for production of documents directed against IRLP, based upon IRLP's reorganization of its ownership structure from a general partnership to a limited partnership. The supplemental motion asserted that IRLP's application had been prepared (and the applicant was controlled) by Sonrise Management Services, Inc., an enterprise which had previously achieved notoriety in other on-going Commission proceedings in which misrepresentation, real-party-in-interest, financial, and other issues were added against various Sonrise applicants. Additionally, VOB observed that IRLP's counsel of record was Thomas Root, the same attorney who had represented the other Sonrise applicants. The VOB motion requested all pertinent documentation concerning the relationship between Sonrise and IRLP. By *Order*, FCC 89M-436, released February 9, 1989, the ALJ granted the supplemental motion and ordered the production of the requested documents within ten days.

3. The Movants claimed that IRLP had submitted copies of several documents falling within the ambit of the original production requests; however, certain other pertinent documents were not produced. But, because of a specific representation by IRLP (included with the produced documents) that "supplemental documents [would] be provided," they elected not to file a motion to compel the production of these "supplemental" documents. Nevertheless, by mid-March 1989, the documents still had not been made available to IRLP, and the deposition of Harry W. Flipping, Jr., IRLP's sole "general partner", was scheduled for March 24, 1989. Thus, with the deposition date rapidly approaching, and the apparent necessity/desire to utilize the requested documents at deposition, counsel for VOB telephoned Root's office and requested compliance with the discovery *Order* prior to the scheduled deposition. By letter dated March 22, 1989, an associate of Root forwarded to VOB's counsel two additional documents. However, the Movants aver that these documents were not responsive to the supplemental motion.

4. Proceeding without the requested documents, the deposition of Flipping was held on March 30, 1989 (having been rescheduled from March 24 because Root had "suddenly become ill" and was hospitalized that day). VOB claimed that, at the deposition, Flipping acknowledged the receipt of voluminous material from Sonrise used to solicit his participation in the application, as well as correspondence by Root regarding the applicant. At the conclusion of Flipping's testimony, counsel for both DBL and VOB discussed with a Root associate, Ilene Sheris, the list of documents previously ordered to be produced. These included: (1) a promissory note from Flipping to Sonrise to which Flipping had referred at deposition; (2) the escrow agreement pursuant to which Root held the applicant's funds (an account which Flipping also testified existed); (3) Sonrise solicitation material sent to Flipping; (4) copies of correspondence between Sonrise and Root; (5) copies of initial correspondence between Flipping and Root; (6) documents evidencing loan commitments made to IRLP; (7) disclosure of individual stamping notations on the Sonrise management agreements; (8) documents

reflecting issues previously designated against Sonrise applicants; (9) evidence of payments by Sonrise into the partnership escrow account; and (10) copies of signature cards for the escrow account.

5. Sheris represented to opposing counsel at deposition that the documents would be produced and that the filing of a motion to compel to obtain these documents would be unnecessary. However, the documents were not produced by Sheris, Root, or anyone else at Root's firm. Thus, fully a month and a half after deposition, DBL and VOB (on May 17, 1989) filed their joint motion to dismiss the IRLP application, contending that the continuing defaults and failures by IRLP to respond and produce the ordered documents was tantamount to a failure to prosecute.

6. IRLP sought an extension of time in which to respond to the motion to dismiss its application. The extension request (filed by Jacob W. Mayer, an attorney "of counsel" to Root's firm) stated that IRLP's counsel at the deposition, Sheris, had left Root's firm on April 6, 1989, and that "no one" was aware of the need "to encourage Mr. Flipping to locate the desired documents if they exist." The Movants opposed the extension request, pointing out that in addition to Sheris, another Root associate had been present at Flipping's deposition. Movants also argued that Mayer presumably had reviewed, or should have reviewed, the deposition transcript upon receipt since Sheris was no longer with the firm. By *Order*, FCC 89M-1575, released June 5, 1989, the ALJ granted the requested extension of time to file IRLP's opposition. On June 12, 1989, IRLP filed an opposition claiming "ignorance" of Sheris' promise to produce the documents due to her departure, and the departure from the firm of the "other associate" who had attended the deposition. IRLP asserted that it was now "unable" to ascertain whether there were, in fact, any documents in existence which were ordered to be produced. IRLP also claimed that it had never received a copy of the transcript of the deposition, and asserted that it should not be required to purchase a copy of the transcript from the reporting service merely for "the privilege of responding to [the joint] motion." IRLP therefore urged the ALJ to deny the motion to dismiss without prejudice to its being refiled after the filing of the deposition transcript with the Commission, pursuant to 47 C.F.R. §1.318(f).

7. In reply, Movants furnished documentary support demonstrating that a copy of the deposition transcript had, in fact, been promptly transmitted to Flipping for his signature (pursuant to 47 C.F.R. §1.318(e)) and subsequent filing. They appended an affidavit of Peggy Ann Litton, a tracer with United Parcel Service (UPS) in Des Moines, Iowa, who avers that the deposition transcript was delivered to Flipping's residence on May 8, 1989. They also filed an affidavit of opposition counsel representing that he had directly contacted Sheris and had been advised that she took careful notes regarding the documents requested and had given them to Root on the day Flipping was deposed. Thus, subsequent to reviewing the various pleadings and documents, the ALJ issued his *Order* dismissing IRLP's application.

8. On appeal, IRLP claims that it was denied "due process" because the ALJ "evidently dismissed IRLP," in large part, on the basis of Movant's reply pleading to which it had no opportunity to respond. IRLP objects to these findings as: (1) "that Mr. Root was made aware of the requested documents"; (2) "that . . . Flipping received the deposition transcript May 8"; (3) "that IRLP's counsel was aware of the document request but attempted to have the forum believe otherwise"; and (4) "that counsel for IRLP cast aspersions on his former associate which he knew to be entirely unwarranted." With respect to the specific grounds for dismissal of IRLP's application contained in the ALJ's *Order* (*i.e.*, "that the documents discussed at deposition were not produced"), IRLP contends (1) that neither Sheris nor present counsel ever agreed that such documents, in fact, existed, and (2) that, in any event, Flipping has not been able to locate them.

9. *Discussion*. At the outset, we reject IRLP's contention that it was denied "due process" because it was not provided a "realistic opportunity" to respond to "new matter." The so-called "new matter" merely served to refute IRLP's representation that "no one" was aware of the need to produce the documents and that it lacked access to a copy of the deposition transcript. Rather, our own independent review of the record establishes that IRLP's application was simply dismissed because of its patent failure from February to May 1989 to comply with the ALJ's specific discovery orders and its agreements to produce long before most recent counsel entered the case.

10. Section 73.3568 of the Commission's Rules, 47 C.F.R. §73.3568, explicitly warns applicants that "the failure to prosecute an application . . . will be cause for dismissal." In this regard, the Commission has previously admonished applicants that the prosecution of an application means timely compliance with procedural and substantive rules including ALJ's orders. *Hillebrand Broadcasting Inc.*, 1 FCC Rcd 419 (1986), *appeal dismissed mem. sub nom. Punta Ybel Communications Ltd. v. FCC*, No. 86-1670 (D.C. Cir. 1988). Thus, a refusal to adhere to outstanding discovery orders constitutes a sufficient basis to dismiss an application. *Faith Center, Inc.*, 92 FCC 2d 1255, 1260-61 (1983) (subsequent history omitted). In *Comuni-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988), the court, in upholding the authority of an ALJ to dismiss an application where the applicant was lax in complying with Commission procedures and dilatory in its filings, enumerated the factors which it considered appropriate when reviewing the dismissal of an applicant from a comparative proceeding:

> the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct.

856 F.2d at 1554. *See also Mark A. Perry*, FCC 89R-46, released August 21, 1989 (Separate Statement).[1]

11. In this case, the ALJ specifically ordered IRLP to produce various documents on two separate occasions (the due dates were February 15 and 20, 1989, respectively). Yet, some three months later, the requested documents still had not been produced, nor had any excuse been proffered for the failure to produce (including the recently-advanced claim that they allegedly "do not exist"). Clearly, there has been no substantial justification or excuse set forth for IRLP's failure to comply with the ALJ's concise orders. Indeed, it strains credulity that none of the requested documents, in fact, existed or were not in the possession of (1) Flipping; (2) the limited partners; or (3) Root. Moreover, in addition to the documents sought

by the supplemental motion, IRLP also earlier failed to produce specific documents identified in the Movants' original motion for production of documents, including: (1) the state certificate of the limited partnership; (2) evidence of payment for ownership interests; (3) documents indicating who initially contacted counsel and the consulting engineer and arranged for financing; (4) checks for payment in the prosecution of the application; (5) documents identifying any sources of funding; and (6) documents evidencing authority to dispense funds. (*See* comments of VOB in support of reply, filed June 23, 1989, at n. 1).

12. Here, the factors enumerated in *Comuni-Centre* have been met. Not only is there no adequate justification for IRLP's non-compliance with the ALJ's discovery orders, it is manifest that the other parties have been prejudiced by IRLP's actions. As noted by VOB in its Opposition, all of the documents requested, excepting those relating to the issues against other Sonrise applicants, were relevant to the question whether IRLP's structure was a "sham," and the continuing failure to make the documents available effectively denied the opposing parties an opportunity to meaningfully cross-examine Flipping at his deposition and to otherwise prepare for the hearing. Obviously, the dilatory conduct revealed by this record, if permitted to continue, would severely limit the usefulness of pre-trial discovery designed to expedite resolution of comparative cases. *Faith Center, Inc.*, 92 FCC 2d at 1260-61.

13. Thus, considering the period of time that elapsed from the release of the ALJ's original discovery *Order* (on January 25, 1989) for the production of documents, until the ALJ's dismissal ruling some five months later (June 27, 1989), we cannot conclude that the ALJ acted beyond his authority in dismissing IRLP's application. The Commission's ALJ's have broad discretion to regulate the course of multiparty comparative proceedings. *See Hillebrand Broadcasting, Inc., supra.* There, the Commission announced a marked change in policy for such proceedings, based on the recognition that delaying the initiation of new service additionally disserves the public interest. Accordingly, the Commission stressed that it would no longer indulge applicants "temporizing activities." The instant proceeding is a prime example of an applicant which has made virtually no effort to comply with an ALJ's discovery orders and its own agreements to produce, and IRLP will receive no solace from this Board, absent extenuating circumstances which have not been demonstrated by our own review of the record. *See Albert E. Gary*, 4 FCC Rcd 4112, 4113 (Rev. Bd. 1989), and *Mark A. Perry, supra.*

14. ACCORDINGLY, IT IS ORDERED, That the Appeal of Iowa Radio Limited Partnership filed June 30, 1989, IS DENIED; and that the Motion to Strike accompanying the Opposition of Dick Broadcasting, Ltd., filed July 10, 1989, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTE

[1] The Separate Statement opined that "it would seem, synthesizing all of the court's reference points, that we should carefully review applicant dismissals by surveying the following factors: (1) Was the fatal dereliction merely an isolated event, or part of a pattern which disrupted the proceeding to the palpable prejudice of other applicants; (2) Was there client knowledge of, responsibility for, or complicity in the operative dereliction(s); (3) On appeal of a dismissal, is the applicant represented by culpable counsel; and, (4) Are there other equitable considerations that might mitigate against absolute dismissal. If factor (1), above, is answered in the affirmative, dismissal would appear to be consistent with case precedent, irrespective of a demonstrated fault of the client. *See Hillebrand Broadcasting* . . . ." Without deciding whether these tests are mandated by the Court's decision or controlling Commission policy, the second *alternative* in factor (1) above would be here answered in the affirmative; that is, a continuing pattern of failure to produce documents has been adequately demonstrated, and the other applicants to this proceeding have been prejudiced as a result thereof.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-387

In re Applications of

ROXANNE GIVENS (hereafter Givens)	File No. BPH-871202MC
TYLER BROADCASTING OF EDEN PRAIRIE (hereafter Tyler)	File No. BPH-871202NQ
MINNESOTA PUBLIC RADIO (hereafter MPR)	File No. BPED-871203MC
STEVEN J. PETERS (hereafter Peters)	File No. BPH-871203ME
NANCY JEAN PETERSON (hereafter Peterson)	File No. BPH-871203MF
SOUTHWEST SUBURBAN BROADCASTING, INC. (hereafter SSBI)	File No. BPH-871203MH
Nicholas Henderson and Raveesh Kumra d/b/a EDEN PRAIRIE BROADCASTING COMPANY (hereafter EPBC)	File No. BPH-871203ML
CRIMIEL COMMUNICATIONS ASSOCIATES LIMITED PARTNERSHIP (hereafter Crimiel)	File No. BPH-871203MN
EDEN PRAIRIE BROADCASTING, INC. (hereafter EPBI)	File No. BPH-871203MP
SKYWARD BROADCASTING LIMITED PARTNERSHIP (hereafter SBLP)	File No. BPH-871203MU
ECHONET CORPORATION (hereafter Echonet)	File No. BPH-871203NA
N. WALTER GOINS (hereafter Goins)	File No. BPH-871203NE
JH BROADCAST LIMITED PARTNERSHIP (hereafter JH)	File No. BPH-871203NF
ANNE M. COUNIHAN (hereafter Counihan)	File No. BPH-871203NQ
COVE COMMUNICATIONS, INC. (hereafter CCI)	File No. BPH-871203NT
Sheldon A. Johnson and Steven C. Fritchman d/b/a EDEN PRAIRIE FM (hereafter EPFM)	File No. BPH-871203NU (PREVIOUSLY DISMISSED)

For Construction Permit
for a New FM Station
on Channel 289A (105.7 MHz)
in Eden Prairie, Minnesota

HEARING DESIGNATION ORDER

Adopted: August 23, 1989; Released: September 7, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. On January 22, 1988, the Chief, FM Branch, returned EPFM's application as insufficient for tender because the elevation contours on its topographic site map were illegible. On February 29, 1988, EPFM filed a petition for reconsideration of the staff's action and requested reinstatement *nunc pro tunc* on the basis that the original site and contour maps contained sufficient information to enable the staff to correctly ascertain the location of EPFM's proposed site. In support of its petition, the applicant submitted a full-scale, photocopied map section.

3. Under the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), (hereafter "Order") clarified in *FM Transmitter Site Map Submissions*, 1 FCC Rcd 381 (1986), which incorporated by reference the Commission's *Public Notice*, Mimeo 3693, released April 5, 1985 [57 RR 2d 1549], the Commission set forth the tenderability criteria for transmitter site maps in commercial FM applications. Specifically, the Public Notice requires that, *inter alia*, "all of the contour lines must be clearly visible. Faded, smudged or otherwise illegible maps are unacceptable."

4. In order to be favorably considered, a petition for reconsideration must establish that the action taken by the designated authority involved erroneous findings of fact or conclusions of law. *See* 47 C.F.R § 1.106(d)(2). EPFM's petition fails to establish that such errors were made. An engineering study revealed that the reduced, grainy photo-

copy of the full quadrangle map submitted originally by EPFM lacked the resolution necessary to evaluate the contour lines surrounding the applicant's proposed site. Consequently, the site elevation in the vicinity of the transmitter site could not be determined. Without this information, the staff was unable to verify, with a degree of confidence and reliability, the accuracy of the stated coordinates of the proposed site, the presence of any nearby communications facilities, obstructing terrain, or the ground elevation of the transmitter site. This final parameter is critical in determining important features of the antenna system, such as radiation center heights above ground and mean sea level, from which the antenna height above average terrain is derived. *See* paragraph 4(b), Appendix to the *Order, supra*.

5. Furthermore, the precedent cited by EPFM in support of its petition is inapposite. That precedent involved applicants who provided faulty geographic coordinates for their respective transmitter sites, but whose applications were found acceptable because they proposed co-location with *existing* licensees; therefore, the correct site coordinates could be independently verified. *See Carta Corp., et al.*, 3 FCC Rcd 798 (1988)(HDO). To the contrary, in the instant case EPFM indicated that its antenna would *not* be co-located on an existing structure. *See* Section V-B, Item 3, FCC Form 301. In light of the foregoing, the staff acted properly in returning EPFM's application. Consequently, EPFM's petition for reconsideration must be denied.

6. *SBLP*. Information before the Commission indicates that SBLP was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of the above proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant dismissed its application rather than resolving these issues. These unresolved issues call into question SBLP's qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

7. Givens and Echonet filed amendments to their applications on April 4, 1988 and September 14, 1988, respectively. Both amendments are proposing to change the location of their proposed transmitter sites. In the *Report and Order* in MM Docket No. 84-750, 50 Fed Reg. 19936 (May 13, 1985), the Commission adopted strict rules governing acceptance of amendments to applications for FM facilities. These rules provide that amendments which address the acceptability or grantability of an application may be filed as a matter of right any time prior to the expiration of the 30-day period triggered by release of the Public Notice announcing that the subject application has been accepted for tender. 50 Fed. Reg. at 19941; *see also* 47 C.F.R. § 73.3522(a)(6). Once this period expires, predesignation amendments "will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514" of our rules. Unauthorized or untimely amendments are subject to return by the FCC's staff without consideration. 47 C.F.R. § 73.3522(a)(6).

8. The 30-day period for filing amendments as a matter of right, in this proceeding, began January 28, 1988 and ended March 1, 1988. Both amendments were filed after the expiration of the 30-day period. Additionally, both applicants failed to make a showing of good cause for the acceptance of the untimely filed amendments as required by Commission rules. Accordingly, the April 4, 1988 amendment filed by Givens and the September 14, 1988 amendment filed by Echonet will be returned.

9. Applicants for new broadcast stations are required by 47 C.F.R. § 73.3580 to give local notice of the filing of their applications. Tyler has published the required notice, but the notice is deficient in that it fails to include the names of all the officers and directors of the corporation and the exact location of its proposed transmitter site. Moreover, the notice was not published once a week for three (3) weeks as is required when the notice is placed in a weekly publication. To remedy these deficiences, Tyler must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

10. Tyler proposes to erect a 113 meter tower (including obstruction lighting) at the coordinates specified in his application. Section V-B, Item 7(a)(1) of Form 301, the tower sketch, and the FAA Form 7460-1 as submitted in the application list the site elevation above mean sea level as 259 meters. Consequently, the height of the tower structure above mean sea level is calculated to be (113m) + (259m) = (372m). Therefore, the 383 meter figure specified in Section V-B, Item 7(a)(3) and the 1231 foot (375 meter) figure specified in the FAA Form 7460-1 are clearly in error. Because we can conclusively derive the erroneous information from the remainder of the application in question, Tyler's application was found to be acceptable for filing. However, Tyler will be required to submit a corrective amendment to the presiding Administrative Law Judge, within 30 days of the release of this Order, to eliminate the tower height above mean sea level discrepancy. In addition, an air hazard issue will be specified.

11. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas

proposed by Givens, MPR, Peters, Peterson, EPBC, Crimiel, EPBI, and Echonet would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

12. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Tyler has not filed the statement. Crimiel and CCI have filed statements but they are deficient because they failed to identify the school(s) or other beneficiary they will utilize in their proposed training program for minorities and women interested in entering the broadcast field. Accordingly, Tyler will be required to file an EEO program and Crimiel and CCI will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order or an appropriate issue will be specified by the Judge.

13. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Tyler, EPBC and EPBI have not completed Item 4 correctly because they have failed to list the required specific information about the applicant itself as requested in Item 4. Accordingly, Tyler, EPBC and EPBI must each submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

14. Peterson's application does not contain a certification indicating that she is financially qualified but stated that she "will amend when financial information is in place." To date Peterson has not amended her application. Accordingly, a financial qualifications issue will be specified below.

15. *Goins.* N. Walter Goins is an 11% stockholder in Halcomm, Inc., the parent company of L.E.O. Broadcasting, Inc. (L.E.O.), which is the licensee of KXLI(TV), St. Cloud, Minnesota. The Grade A contour of KXLI(TV) would encompass the entire community of license of Goins' proposed application in contravention of 47 C.F.R. § 73.3555(b)(2). Goins has indicated his intent to terminate his relationship with KXLI(TV) and L.E.O. in the event of grant of the referenced application. Accordingly, an appropriate condition will be specified below.

16. Lisa F. Bittman and Robert Frensen are principals of CCI. Bittman is general sales manager of WLOL(FM), Minneapolis, MN and Frensen is general manager of KSTP(AM), Minneapolis, MN. The Commission's cross-interest policy prohibits ownership of an FM station and employment in a management capacity at an AM station or FM station in the same market. *See Reexamination of the Commission's Cross-Interest Policy*, 2 FCC Rcd 3699 (1987). Bittman and Frensen have indicated their intent to terminate their relationship with Stations WLOL(FM) and KSTP(AM) in the event of grant of the referenced application. Accordingly, in the event of grant of CCI's application, Bittman and Frensen will be required to sever all connections with Stations WLOL(FM) and KSTP(AM) prior to the commencement of program test authority.

17. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATES AMENDMENTS FILED
Tyler	March 22, 1988
MPR	August 19, 1988 (Engineering)
Peters	November 14, 1988 (Engineering); July 24, 1989
EPBC	June 6, 1989
Crimiel	July 28, 1988
EPBI	June 29, 1988
SBLP	May 2, 1988; November 15, 1988; November 16, 1988; December 12, 1988; December 21, 1988; December 22, 1988; January 9, 1989; January 13, 1989; April 19, 1989; June 13, 1989
Echonet	April 26, 1988; June 6, 1988; July 12, 1988; September 23, 1988; June 14, 1989; February 8, 1989
Goins	December 15, 1988
CCI	March 2, 1989

18. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

19. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

20. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of SBLP.

2. To determine whether SBLP's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 through 2 above, whether SBLP possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine with respect to Peterson, whether the applicant is financially qualified.

5. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Givens, Tyler, MPR, Peters, Peterson, EPBC, Crimiel, EPBI, and Echonet would constitute a hazard to air navigation.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

21. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Sheldon A. Johnson and Steven C. Fritchman d/b/a Eden Prairie FM IS HEREBY DENIED.

22. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraphs 7-8 hereinabove, the amendments filed by Givens and Echonet on April 4, 1988 and September 14, 1988, respectively, ARE HEREBY RETURNED.

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Tyler shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished.

24. IT IS FURTHER ORDERED, That Tyler shall submit an amendment in accordance with paragraph 10 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Tyler, Crimiel and CCI shall submit Section VI information in accordance with the requirement of 47 C.F.R. § 73.2080(c) to the presiding Administrative Law Judge.

26. IT IS FURTHER ORDERED, That Tyler, EPBC, and EPBI shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

27. IT IS FURTHER ORDERED, That, in the event of grant of Goins' application, he will be ordered to divest himself of all interests in and sever all connections with Stations KXLI(TV), St. Cloud, Minnesota and L.E.O. Broadcasting, Inc. prior to the commencment of program test authority.

28. IT IS FURTHER ORDERED, That, in the event of grant of CCI's application, Lisa F. Bittman and Robert Frensen will be ordered to divest themselves of all interests in and sever all connections with Stations WLOL(FM) and KSTP(AM), Minneapolis, Minnesota, prior to the commencement of program test authority.

29. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Tyler, MPR, Peters, EPBC, Crimiel, EPBI, SBLP, Echonet, Goins and CCI ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

30. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

31. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

32. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

33. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-296

In re Applications of

INLET BROADCASTING CO.	File No. BPH-870724MA
MURMAR MEDIA CORPORATION	File No. BPH-870730ME
JERRY W. OAKLEY	File No. BPH-870730MQ

For Construction Permit for a
New FM Station, Channel 233A
in Murrells Inlet, South Carolina

Appearances

Eric S. Kravetz on behalf of Inlet Broadcasting Company; *Mark J. Prak* on behalf of Jerry W. Oakley; and *Robert G. Allen, Denise B. Moline, and Rachael O. Davis* on behalf of MurMar Media Corporation.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: August 30, 1989; Released: September 8, 1989

1. The three remaining applicants and five others, now dismissed, were designated for a comparative hearing on June 6, 1988. *Palmetto Broadcasting, Inc. of Murrells Inlet*, 3 F.C.C. Rcd 3928 (1988). The following issues will be considered in this decision; all other issues have been previously resolved or are now moot:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. A prehearing was held on August 23, 1988 (Tr. 1-13), written testimony was exchanged on February 24, 1989, and hearing sessions were held on March 13, 1989 (Tr. 14-194/249) and March 14, 1989 (Tr. 250-86). The record was closed on March 14, 1989. *Order*, FCC 89M-859, released March 17, 1989. Corrections were made to the transcript on June 5, 1989 (*Order*, FCC 89M-1579, released June 5, 1989), proposed findings and conclusions were filed on May 5, 1989 and replies on May 25, 1989.

FINDINGS OF FACT

Comparison of the Applicants

Diversification of Control of the Media of Mass Communications

3. **Inlet** and its general partners, Robert E. Johnson and Billy J. Wommack, hold no interests in the media of mass communications. Inlet Exhs. 2, 3. Wommack is employed as an engineer for Beach Broadcasting Company and he provides engineering services to other area stations. Wommack will quit his job at Beach Broadcasting but he may continue to provide engineering assistance to area stations if it does not conflict with his commitment to Inlet. Inlet Exh. 3.

4. **MurMar** and its stockholders have no interests in the media of mass communications. MurMar Exh. 4.

5. **Oakley** is president, director, stockholder in three licensees, Westcom, Ltd., licensee of WIRC and WXRC-FM, Hickory, North Carolina, Tenncom, Ltd., licensee of WHAL and WYCQ-FM, Shelbyville, Tennessee, and Northcom, Ltd., licensee of WIRB and WLHQ-FM, Enterprise, Alabama. Oakley Exh. 1, at 1, Attachments A and B. Pursuant to employment agreements with Westcom, Tenncom and Northcom, Oakley is in charge of the management and administration of the licensees' radio stations. MurMar Exhs. 10, 11, and 12. Oakley is a 10% shareholder of Westcom, Ltd., a 10% shareholder of Tenncom, Ltd. and a 9.1% shareholder of Northcom, Ltd. Oakley Exh. 1.

6. Oakley represents in his testimony that he will resign from his employment with Tenncom, Westcom, and Northcom and divest his interests (Oakley Exh. 1, at 1-2) but he did not make that promise before the B cutoff date, October 2, 1987. MurMar Exh. 13; Tr. 266-67. He first proposed his divestiture on October 7, 1987. That divestiture was accepted but the comparative advantage was disallowed. *HDO*, *supra*, 3 F.C.C. Rcd 3928, 3929.

7. Oakley's contract with Westcom runs until December 30, 1990 and, unlike his contract with Tenncom and Northcom, does not give Oakley the right to terminate. MurMar Exh. 10, at 3; Exh. 11, at 1; Exh. 12, at 3. Moreover, Oakley's continued supervision of the Westcom stations was a material condition of the 1985 sale to Westcom. The seller/creditor did not require the buyer/debtor to personally guarantee the promissory note in consideration for the assignment because Oakley was employed to supervise station operations for the buyer. Tr. 278-9, 282-3. Oakley has not notified the seller/creditor that he will terminate his contract because he believes Westcom may sell the stations. Tr. 280-1. Despite his agreement, he believes he is free to quit his employment. Tr. 278.

Full-time Participation in Station Operation by Owners

8. **Inlet** is a general partnership with two general partners, Robert E. Johnson and Billy J. Wommack. Inlet Exh. 1, at 1. They each own 50% of the equity. *Id.* The partners are sharing the cost of preparing and prosecuting the application. Inlet Exh. 1, at 3,6; Tr. 30, 46, 94-95. Johnson proposes to work full time, 40 hours per week, as the station's general manager. Inlet Exh. 2. He will be primarily responsible for overseeing the station's internal administrative activities. *Id.* Johnson will particularly supervise sales. *Id.* Johnson lives in Surfside Beach, South

Carolina, which is within the service area. *Id.* He has lived in the service area since 1971. *Id.* Johnson worked full time as the manager and owner of WYAK from 1977 and WYAK-FM from 1980 until 1985 when both facilities were sold. Inlet Exh. 2, at 1-2.

9. Wommack will be employed at the station full time, 40 hours per week, as the program director and chief engineer. Inlet Exh. 3, at 1. He will supervise on-air personnel, all programming, and technical operations. Inlet Exh. 3, at 1. Tr. 113. Wommack has lived in Murrells Inlet since April 1985. Wommack has worked at radio stations beginning in September 1980 on a part-time basis and from May 1981 to the present on a full-time basis. Inlet Exh. 3, at 1. His positions have included staff and management responsibilities. *Id.*

10. **MurMar** is a corporation with three stockholders, Robert L. Eredics, who is president, a director, 25% stockholder and subscriber, Ronald K. Bishop, who is vice president, director, and 15% stockholder and subscriber and Marietta Media Corp., which holds or will hold 60% of the shares. MurMar Exh. 1, at 1. Aaron M. Huck is secretary-treasurer and director but he owns no shares. *Id.* Marietta Media Corp. is wholly owned by Catherine C. Blauser and she votes Marietta's shares. Ms. Blauser's spouse, Dennis D., and Aaron M. Huck are officers and directors of Marietta Media Corp. MurMar Exh. 1, at 2.

11. Eredics proposes to work full time, 40 hours per week as the general manager of the station. MurMar Exh. 2, at 1. He will be responsible for the day-to-day management and operations of the station. *Id.* Eredics has lived in Myrtle Beach, which is in the proposed 1 mV/m contour of the station, since March 1986. He belongs to the Myrtle Beach Chamber of Commerce. MurMar Exh. 2, at 1. Occasionally he attends Chamber meetings. Tr. 156-7. He belongs to the Waccamaw Audubon Society, a local church, and a professional association, the Grand Strand Pharmaceutical Association. MurMar Exh. 2, at 2.

12. Bishop proposes to work full time, 40 hours per week, as the sales manager. MurMar Exh. 3. He will oversee sales and the financial condition of the station, and will develop programming. Bishop will move to Murrells Inlet. From 1979 to 1987, Bishop worked as a sales manager at WBRJ/WEYQ, Marietta, Ohio. *Id.* He was also a 17% owner of the stations. From 1969 to 1979, he worked at other broadcast stations. *Id.*, at 2.

13. **Oakley** is an individual applicant. Oakley Exh. 1, at 1. He proposes to work as the full-time, 40 hours per week, general manager. *Id.* He will establish and implement all policies and procedures for the stations. *Id.* He will have all supervisory responsibility at the station. *Id.* Oakley will move to Murrells Inlet if his proposal is granted. Oakley Exh. 1, at 1. Oakley was employed as a manager at broadcast stations from 1961 to 1985 and presently as a manager and owner. Oakley Exh. 1, at Attachment A.

Auxiliary Power

14. Inlet, MurMar, and Oakley propose an auxiliary power generator. Inlet Exh. 4; MurMar Exh. 5; Oakley Exh. 1, at 2.

CONCLUSIONS

Comparison of the Applicants

Diversification of the Media of Mass Communications

15. Inlet and its general partners have no interests in the media of mass communications. While general partner Wommack intends to provide engineering services to stations on a contract basis, that service is not a "significant managerial position" at the stations he will serve and his continuing that activity will not affect Inlet's diversification standing. *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 n. 5 (1965). Similarly MurMar and its stockholder/stock subscribers have no interests in the media of mass communications. Inlet and MurMar are equal applicants on the criterion of diversification.

16. Oakley, who is an individual applicant, has a minority interest in three companies, Tenncom, Westcom, and Northcom, that operate, respectively, two radio broadcast stations each in Shelbyville, Tennessee, Hickory, North Carolina, and Enterprise, Alabama. Oakley supervises and manages the stations. Oakley did not make a timely divestiture pledge of his positions with these stations.

17. All six stations are in the southern region of the country and two of them are in the next state. Because Oakley has overall supervisory authority over the stations, an ownership interest in them, and he did not make a timely divestiture pledge, his association with and ownership in the six stations makes him the least favored applicant on the diversification criterion. *See Jarad Broadcasting Company, Inc.*, 1 F.C.C. Rcd 181, 180 (Review Bd. 1986).

18. While Oakley argues that its promise to divest was timely filed, the Bureau in the HDO specifically considered the amendment making the divestiture pledge and concluded that it was not filed by the due date of October 2, 1989. *HDO, supra*, 3 F.C.C. Rcd 3928, 3929. The Bureau held that the pledge could not be asserted by Oakley to improve his comparative standing. *Id.* Oakley also argues that MurMar Exh. 13 shows that its divestiture pledge was filed in proper form by October 2, 1987, the B cutoff date. That exhibit, however, shows that the signed amendment was filed on October 7, 1989, after the B cutoff day. While the covering letter represents that the application was filed on October 2, 1987, it does not state that the amendment was filed on that day.

19. The parties have also urged that Oakley has a contractual arrangement with Westcom, the licensee of the two nearest facilities in Hickory, North Carolina, to oversee the operation of those stations until December 1990. In fact the record reflects that Oakley's promise of supervision was a key element in the seller financing the sale for Westcom. There is no reliable evidence that he can or will walk away from his promise to Westcom. Oakley goes on at length about the enforceability of employment contracts but the issue is not whether Westcom could force Oakley to comply after litigating its rights, but whether Oakley has an obligation to continue managing Westcom's stations until 1990. Oakley's employment contract does not permit him to terminate his employment with Westcom. His arrangement with Westcom is in contrast to his employment agreements with Northcom and Tenncom which specifically permit him to terminate the

arrangement within 180 days. Oakley's arrangement with Westcom was part of the consideration for the financing and sale of the stations to Westcom. Oakley was both a seller and a buyer in the transaction and has a financial interest in performing the contract. Oakley has not pointed to any willingness on the part of Westcom to release him from his agreement. He has not even established that Westcom's owners are aware of his purported commitment to this proposal. If Oakley's divestiture pledge had been timely, it would also lack credibility because of his contract to manage and administer Westcom's two broadcast stations in Hickory, North Carolina.

Full-time Participation in Station Operation by Owners

20. Both of Inlet's general partners have promised to manage full time, 40 hours per week. Robert Johnson will be the general manager and Billy Wommack will be the program director and chief engineer. These positions are among those staff positions which, if held by owners, are accorded "particular weight." *Policy Statement on Comparative Broadcast Hearings, supra*, 1 F.C.C. 2d 393, 394.

21. Oakley argues that Wommack's position as chief engineer is not one that involves policy. The record reflects that the Inlet partners have shared decision making and there is no reason to conclude that as the facility's program director and chief engineer he will not share decision making authority with Johnson. Moreover, all positions at small radio stations entail some duties which do not involve supervision and policy making. It would be unrealistic to conclude otherwise. *See Tulsa Broadcasting Group*, 2 F.C.C. Rcd 6124, 6128-29 (Review Bd. 1987); *review denied*, FCC 88-238, released July 26, 1988.

22. Oakley urges that because Johnson proposed at one time to manage another facility while this proposal was pending, his promise was not unequivocal. Inlet points out that that application was dismissed before Johnson filed his integration promise on September 15, 1989. On that date, Johnson had no other outstanding promise to manage. Oakley also maintains that Inlet's principals failed to answer interrogatories truthfully about the possible disposition of their interests. The evidence does not support that allegation. Johnson was asked why Inlet represented in interrogatories that there had been no discussions about the sale of Johnson and Wommack's interests when he and Wommack had discussed what would happen if one of them wanted to sell. Johnson said he assumed the question referred to a sale to an outside party. Tr. 102. Johnson's answer is plausible and Oakley has not demonstrated that the interrogatory in question could not have been interpreted as Inlet did. Certainly, there would have been no reason for Inlet to withhold discussions about how a buyout would work. Oakley next argues that the buyout arrangement could lead to Johnson controlling the partnership. Assuming that were the case, Inlet would still have a fully integrated proposal. In terms of control, both partners have the ability to exercise negative control since they each own 50% of the equity.

23. MurMar argues that Wommack's pledge to terminate his current employment with Beach Broadcasting is equivocal. There is no evidence to support that view. At one place in the record Wommack said he would provide engineering help to Beach if the station went off the air. Tr. 142. That possibility does not mean that Wommack will not be available 40 hours per week to Inlet. Following the filing of the proposed findings, Wommack changed positions and he no longer works for Beach Broadcasting. His other contract engineering work, he said, would continue only if it does not interfere with his commitment to Inlet. Inlet Exh. 3, at 2. Nor is there evidence, as MurMar alleges, that Wommack will cede to Johnson all decision making authority.

24. MurMar also urges that Johnson's farming activities may prevent him from spending full time at the station. Johnson has said he will spend full time at the station and MurMar has not shown that that decision is not totally within Johnson's discretion and that his representation was not a promise made in good faith. Inlet is entitled to full integration credit.

25. MurMar is a corporation with three stockholders, two of whom propose to work full time, 40 hours per week at the station. Robert Eredics, who owns or will own 25% of the stock, will work as the general manager. The other integrated owner is Ronald Bishop, who owns or will own 15% of the stock; he proposes to work as the sales manager. Their combined integration represents 40% of MurMar's stock. The controlling owner, Marietta Media Corp., will not be integrated. MurMar's integration proposal is substantially less than Inlet's 100% promise. Inlet urges half-heartedly that Ronald Bishop's promise to become sales manager is not managerial because he will spend 75% of his time selling advertising. Bishop testified, however, that his job functions as sales manager will mirror similar positions at other stations with small service areas. There is no reason to doubt that he will manage sales. Oakley maintains that Bishop and Eredics will not exercise much authority because the 60% owner of MurMar, Marietta Media Corp., actually controls. Marietta is owned by one individual, Catherine C. Blauser. While it is possible that Blauser will dominate policy, Bishop and Eredics are only being credited with a minority interest. The effect of that assessment is to put them at a significant comparative disadvantage.

26. Oakley is an individual applicant who proposes to work full time, 40 hours per week, as the general manager of the station. While he has management duties at six other stations, which currently take 50-60 hours per week, he has said he would spend full time working on the Murrells Inlet facility. He has stated he will sever his arrangements with the six stations and, at least with regard to four of them, that appears possible. Oakley will be credited with full-time integration.

27. Inlet and Oakley are quantitatively equal but not qualitatively. Inlet's partners are to be preferred over Oakley because they already live in the service area. Oakley receives some credit for his promise to move to the community. Inlet's partners have broadcast experience and so does Oakley. While Oakley's broadcast experience is of longer duration than Inlet's, one of Inlet's partners, Billy Wommack currently works at a broadcast station on a day-to-day basis. Oakley has not done so since 1985. In terms of broadcast experience Inlet and Oakley are relatively equal. But even if Oakley's broadcast experience received more weight than the experience of Inlet's principals, it would not outweigh Inlet's substantial preference for local residence. Inlet is to be preferred because of its partners' current association with the service area.

Auxiliary Power

28. The three applicants are equal in their proposals for auxiliary power.

Summary Comparison

29. Inlet and Oakley are to be preferred over MurMar for their 100% integration proposals over MurMar's 40% proposal. Inlet is to be preferred over Oakley for the quality of its integration proposal. In addition, Inlet is to be preferred over Oakley because of Oakley's media ownership and associations. Thus, overall, Inlet is comparatively superior to MurMar and Oakley and its proposal would best serve the public interest.

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend, filed July 14, 1989 by Inlet Broadcasting Company IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend, filed August 28, 1989 by Jerry W. Oakley IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the applications of MurMar Media Corporation (File No. BPH-870730ME) and Jerry W. Oakley (File No. BPH-870730MQ) ARE DENIED and the application of Inlet Broadcasting Co. (File No. BPH-870724MA) for a construction permit for a new commercial FM station on Channel 233A at Murrells Inlet, South Carolina IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CENTEL TELEPHONE COMPANIES — Transmittal Nos. 100 and 123

Waiver of Part 69
Access Customer Services
Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: August 30, 1989; Released: August 31, 1989

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 15, 1989, Centel Telephone Companies (Centel), on behalf of Centel-Nevada, filed a petition for waiver of Section 69.4(b), as well as Part 69, Subparts B, D, and E of the Commission's Rules, 47 C.F.R. § 69.4(b), Subparts B, D, and E.[1] Centel seeks a waiver to establish two rate elements to recover the costs associated with the proposed service, Access Customer Services (ACS). On January 5, 1989, Centel filed Transmittal No. 100 which would implement the rate elements proposed in the petition for waiver. On August 4, 1989, Centel filed Transmittal No. 123 which revised portions of Transmittal No. 100.[2] These transmittals are scheduled to become effective on September 1, 1989. No pleadings were filed against either of the transmittals or the waiver petition. In addition, Centel has informally submitted written responses to a series of questions posed by the Tariff Division staff.

II. BACKGROUND

2. Centel explains that customers of ACS will be operator services providers or any customer who wishes to perform operator service type functions (OSP) on an interstate basis. Centel indicates that the end user of this service will typically be a hotel guest who places a 0+ call from the hotel premises. That call will be switched over Feature Group A (FGA) switched access facilities to Centel's ACS customer, the OSP, whose facilities are located within the local exchange area. The OSP will process the end user's billing information such as the calling and called numbers; designate the appropriate interexchange carrier (IC) to which the end user's call will be routed;[3] and dial the designated IC via a line which is connected to the call transfer function resident in Centel's central office. Using this function, Centel, on behalf of the OSP, will transfer the end user's call from the OSP to the designated IC's point of presence (POP). Centel Petition at 2.[4]

3. The ACS customer will use a partitioned portion of Centel's central office switch to conduct its operator billing and transfer services. The ACS customer will be charged all FGA switched access rates and Carrier Common Line charges. According to Centel, ACS will involve two new rate elements -- the Access Register element which will recover the costs of providing the calling and called number to the OSP, and the Access Custom Service which will recover the costs of the central office functions, including call transfer, "call park," and "ring again." ACS customers will be assessed these rates on a per call attempt basis. *Id.* at 2-3.

III. DISCUSSION

4. In reviewing Cental's original transmittal and supporting data, the Bureau had considerable difficulty determining the nature of Centel's proposed service -- in particular whether the service should be characterized as access or as interexchange. The petition for waiver that was filed subsequently did nothing to provide further clarification of this question. As a result, the Bureau submitted a series of informal questions to Centel to attempt to define the nature of the service. In the course of reviewing Centel's responses, certain aspects of the service were clarified; however, additional questions were raised concerning this same issue.

5. The proper characterization of the proposed service is information the Bureau must have before we can decide whether a waiver is necessary or appropriate. Until Centel is able to clearly define in a waiver petition the type of service it proposes to offer, we cannot determine whether a waiver would be proper. Therefore, Centel's petition for waiver must be dismissed, without prejudice, and its accompanying tariff transmittals rejected for lack of a requisite Part 69 waiver.

IV. CONCLUSION AND ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for waiver filed by the Centel Telephone Companies, IS DISMISSED WITHOUT PREJUDICE.

7. IT IS FURTHER ORDERED that Tariff F.C.C. No. 1, Transmittal Nos. 100 and 123, filed by the Centel Telephone Companies, ARE REJECTED.

8. IT IS FURTHER ORDERED that the Centel Telephone Companies SHALL FILE tariff revisions not later than September 11, 1989, to become effective on one day's notice, in order to remove rejected material from its tariff. For this purpose, Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58 and 61.59, are waived and Special Permission No. 89-668 is assigned.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTES

[1] Centel Petition for Waiver, filed June 15, 1989 (Centel Petition).

[2] Centel Tariff F.C.C. No. 1, Transmittal No. 100, filed Jan. 5, 1989; Centel Tariff F.C.C. No. 1, Transmittal No. 123, filed Aug. 4, 1989. The effective date of Transmittal No. 100 has been deferred several times.

[3] Centel indicates that the call will be routed in accordance with the end user's direction, if given. Centel Petition at n.3.

[4] A portion of this description was also extracted from Centel's responses to our questions.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166,
Phase I

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

Motion for Extension of Time

ORDER

Adopted: August 31, 1989; Released: September 5, 1989

By the Deputy Chief, Common Carrier Bureau:

1. On August 15, 1989, MCI Telecommunications Corporation (MCI) filed a motion requesting the Commission to extend until October 13, 1989, the date for filing oppositions to the supplemental direct cases submitted by American Telephone and Telegraph Company (AT&T) and the Bell Operating Companies (BOCs) in the above-captioned proceeding. On August 25, 1989, the BellSouth Telephone Companies filed an opposition to the MCI motion. New England Telephone and Telegraph Company and New York Telephone Company (NYNEX), and Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West), filed oppositions on August 30, 1989.[1]

2. MCI states that the arguments which it will raise in its opposition will be predicated in large part on its analysis of the Shared Network Facility Agreements (SNFAs) and related documents filed by the BOCs and AT&T on June 13, 1989. MCI Motion at 1. MCI argues that it cannot respond adequately to the positions taken by the BOCs and AT&T that SNFAs are not unreasonably discriminatory vis-a-vis special access services unless it is permitted a reasonable period of time to review and analyze the actual SNFAs and supporting documents. *Id.* at 2.

3. MCI asserts that it has been unable to undertake a complete review of the SNFA documents because a significant portion of the data that the BOCs were ordered by the Commission to file appears to be missing. *Id.* MCI contends that it will not receive these missing data in time to analyze the data and include the results of this analysis in its opposition required to be filed on September 13, 1989. Finally, MCI argues that no party will be prejudiced by the requested extension, and that the public interest will be served because the Commission will have a complete record before it in this investigation.

4. BellSouth states that on August 17, 1989, the BellSouth Companies forwarded to MCI responses to MCI's questions. BellSouth Opposition at 1-2. BellSouth argues that, therefore, the essential predicate of MCI's motion, that it will not receive their missing data in time to analyze the data and include the results of this analysis in its pleading, is incorrect. *Id.* at 2. BellSouth also contends that MCI has failed to demonstrate any lawful entitlement to additional information in the remand proceeding. It characterizes MCI's motion as "little more than a thinly veiled attempt to commingle the adjudicatory complaint proceedings and the remand proceeding." *Id.*

5. NYNEX asserts that MCI first began making allegations similar to those contained in the instant motion in *ex parte* presentations to the Commission on June 29 and July 10, 1989. NYNEX Opposition at 2. NYNEX alleges that MCI's objections to the data contained in the BOCs' filings were vague and unfocused. It maintains that MCI did not specify exactly what data it found insufficient until August 7, 1989. *Id.* at 2-3. According to NYNEX, it responded on August 18, 1989, to MCI's largely unjustified complaints regarding NYNEX's information. *Id.* at 5. NYNEX concludes that any time pressure MCI may be experiencing is due to its own failure to bring specific questions to NYNEX's attention before August 7, 1989. *Id.* at 5-6.

6. US West contends that MCI already has been afforded a sufficient period in which to review and analyze the SNFA documents, that any errors in the submitted materials are minor and should not affect analysis by interested parties, and that MCI is seeking delay in this proceeding in a manipulative effort intended to provide MCI with an opportunity to use "the discovery it is obtaining in the SNFA complaint proceedings in its opposition to the supplemental direct cases." US West Opposition at 1, 2, 6-7.

7. The Common Carrier Bureau has reviewed MCI's motion, the statement in support, and the oppositions, and we conclude that the public interest would be served by a grant of MCI's motion. We also conclude that other interested parties should be granted a similar extension. Therefore, all oppositions to the supplemental direct cases submitted by the BOCs and AT&T must be filed not later than October 13, 1989. Rebuttals to the oppositions should be filed not later than November 13, 1989.

8. Accordingly, IT IS ORDERED that the motion for extension of time filed by MCI Telecommunications Corporation with regard to the above-captioned proceeding IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTE

[1] LiTel Telecommunications Corporation, Clark-Bader, Inc., d/b/a TMC Long Distance, Advanced Telecommunications Corporation, Microtel Incorporated, Transcall America Incorporated, Advance Network Systems Incorporated, Claydesta Communications Incorporated and Action Telcom Company filed a joint statement in support of MCI's Motion on August 25, 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI
TELECOMMUNICATIONS
CORPORATION,
Complainant,

v. File Nos. E-89-88
through E-89-110

THE BELL TELEPHONE COMPANY OF
PENNSYLVANIA, *et al.*,
Defendants.

PROTECTIVE ORDER

Adopted: August 30, 1989; Released: September 1, 1989

By the Deputy Chief, Common Carrier Bureau:

In accordance with the general guidelines established at the Status Conference held in the above - captioned proceedings on August 11, 1989 and to expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, protect adequately material entitled to be kept confidential, and insure that protection is afforded only to material so entitled, IT IS ORDERED:

1. Except with the prior written consent of the party or other person originally designating a document to be stamped as a confidential document, or as herein provided under this order, no stamped confidential document may be disclosed to any person.

2. For purposes of this Order, a "stamped confidential document" means any document which bears the legend (or which shall otherwise have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER" to signify that it contains information believed to be subject to protection under Sections 0.457 and 0.459 of the Commission's Rules.

3. The term "document" means all written, recorded, or graphic material, whether produced or created by a party or another person, whether produced pursuant to subpoena, by agreement, or otherwise. Interrogatory answers, deposition transcripts and exhibits, pleadings, motions, affidavits, and briefs that quote, summarize, or contain materials entitled to protection may be accorded status as a stamped confidential document, but, to the extent feasible, shall be prepared in such a manner that the confidential information is bound separately from that not entitled to protection.

4. Notwithstanding paragraph 1, stamped confidential documents may be disclosed to counsel for the parties who are actively engaged in the conduct of the above-captioned complaint proceedings (including any administrative or judicial review thereof) their associated attorneys, secretaries, paralegals and other employees of such counsel to the extent reasonably necessary to render professional services in their respective complaint proceedings; to persons with prior knowledge of the documents or the confidential information contained therein, and their agents; and to the Commission and its staff. Counsel shall limit disclosure to personnel in a position to use the information for competitive commercial or business purposes to the minimum extent disclosure to such personnel is needed by counsel to obtain analysis of such documents. Subject to the provisions of subparagraph (d), such documents may also be disclosed-

(a) to any person designated by the Commission, upon such terms as the Commission may deem proper, where such disclosure is found to be in the public interest after due notice and opportunity to comment has been afforded the party or person designating the document as confidential;

(b) to any party of record in the Commission's Special Access Tariffs Investigation[1] and any party of record in the formal and informal complaint proceedings listed in Appendices B and C of the Public Notice (DA 89-829) released July 14, 1989, as amended August 21, 1989 (DA 89-964) where such party has duly filed a Notice of Appearance to attend depositions related to the above - captioned complaint proceedings; and

(c) to persons noticed for depositions to the extent reasonably necessary in preparing to testify; to outside consultants or experts retained for the purpose of assisting counsel in the complaint proceedings; to employees of parties involved solely in one or more aspects of organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with these actions, including the performance of such duties in relation to a computerized litigation support system; and to employees of third-party contractors performing one or more of these functions.

(d) Parties or persons provided or obtaining access to confidential information under subparagraphs (b) and (c) shall have signed and filed with the Bureau a form containing-

(1) a recital that the signatory has read and understands this Order;

(2) a recital that the signatory understands that unauthorized disclosures of the stamped confidential information constitute a violation of this Protective Order; and

(3) a statement that the signatory consents to be bound by the terms of this Protective Order.

5. A deponent may during the deposition be shown, and examined about, stamped confidential documents if the deponent already knows the confidential information contained therein or if the provisions of paragraph 4(d) are complied with. Deponents shall not retain or copy portions of the transcript of their depositions that contain confidential information not provided by them or the entities they represent unless they sign the form prescribed in paragraph 4(d).

6. Parties (and deponents) to any deposition may, no later than 5 days from the close of discovery in the above-captioned complaint proceedings, designate pages of the deposition transcript (and exhibits thereto) as confidential. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential - Subject to Protection Pursuant to Protective Order." Until expiration of the above stated period, the parties must treat the entire deposition transcript and its exhibits as subject to protection against disclosure under this Order. If no party or deponent timely designates information in a deposition as confidential, then none of the deposition transcript or its exhibits need be treated as confidential. If a timely designation is made, any confidential portions and exhibits filed with this Commission must be filed in accordance with Paragraph 8 of this Order, separately from the portions and exhibits not so marked.

7. A party (or aggrieved entity permitted by the Bureau to intervene for such purpose) may petition the Bureau for a ruling that a document (or category of documents) stamped as confidential is not entitled to such status and protection. The party or other person that designated the document as confidential shall be given notice of the petition and an opportunity to respond. To maintain confidential status, the proponent of confidentiality must show by a preponderance of the evidence that there is good cause for the document to have such protection.

8. Stamped confidential documents need not be filed with the Commission except when required in connection with motions under the Commission's Rules or when offered as evidence in the complaint proceedings. If filed, they shall be filed under seal and shall remain sealed while in Commission offices so long as they retain their status as stamped confidential documents. Unless otherwise directed by the Bureau, confidential filings shall be served only on the Commission, parties to the above-captioned complaint proceedings and parties that were provided or otherwise obtained access to such confidential information pursuant to Paragraph 4 of this Order.

9. Parties or persons obtaining confidential information under the terms of this Order may also use such information in any pleading filed in the Commission's Special Access Tariffs Investigation,[2] provided that the party or person so referencing the information complies with the following procedures:

(a) Any portions of the pleading which contain such confidential information are physically segregated from the remainder of the pleading;

(b) the portions containing such confidential information are covered by a separate letter referencing this Protective Order;

(c) each page of the filing which contains such confidential information subject to this Order is clearly marked "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER"; and

(d) the confidential portions of the pleading are served only upon the Commission, parties to the above - captioned complaint proceedings and to any non-party where such non-party has complied with Paragraph 4 of this Order, unless otherwise directed by the Commission.

10. Except as otherwise provided herein, parties or persons obtaining access to stamped confidential documents under this Order shall use the information only for preparation and prosecution of the complaint proceeding in which it was obtained and/or the Special Access Tariff Investigation and shall not use such information for any other purpose, including business, governmental, commerical, or administrative or judicial proceedings.

11. Disclosure of materials described herein shall not be deemed a waiver by the party designating the materials as confidential in any other proceeding, agency or court, of any privilege or entitlement to confidential treatment which could be raised. Parties or persons obtaining access to confidential materials pursuant to this Order: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and (c) agree that accidental disclosure of privileged information shall not be deemed a waiver of the privilege.

12. If another administrative agency or a court subpoenas or orders production of stamped confidential documents which a party has obtained under the terms of this Order, such party shall promptly notify the party or other person who designated the document as confidential of the pendency of such subpoena or order.

13. Nothing in this Order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of stamped confidential documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 4(d).

14. The provisions of this Order shall not terminate at the conclusion of these actions. Within 90 days after final conclusion of all aspects of the complaint and remand proceedings, stamped confidential documents and all copies of same (other than exhibits of record) shall be returned to the party or person which produced such documents or, at the option of the producer (if it retains at least one copy of the same), destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the documents not more than 120 days after final termination of these proceedings.

15. The entry of this Order is without prejudice to the rights of any party to apply for additional or different protection where it is deemed necessary or to object to discovery that it believes to be otherwise improper.

16. All counsel of record are responsible for employing reasonable measures to control, consistent with this Order, duplication of, access to, and distribution of copies of documents stamped confidential. Parties shall not duplicate any stamped confidential document except working copies and for filing with the Commission under seal.

17. This Order is issued under authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon its release date.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, *on remand*, MCI Telecommunications Corp. v. FCC, 842 F.2d 1296 (D.C. Cir. 1988).

[2] *See supra*, n.1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Editorial Updating of Part 73 of the
FCC Rules to Conform Them with Current
Practice in Implementing International
Commitments of the United States
Relating to AM, FM, and TV Broadcasting

ORDER

Adopted: August 30, 1989; Released: September 8, 1989

By the Chief, Mass Media Bureau:

1. This order updates portions of Part 73 of the Commission's Rules, 47 C.F.R. Part 73, by editorial changes that bring them into conformity with the current texts of treaties, conventions, and other international agreements, arrangements and understandings affecting AM, FM and TV broadcasting. The rule amendments adopted herein embody current FCC practice in carrying out international commitments of the United States, principally under:

The Constitution of the International Telecommunication Union;

The ITU Convention, Nice, 1989;

The ITU Radio Regulations;

The Final Acts of the Regional Administrative MF Broadcasting Conference (Region 2) Rio de Janeiro, 1981;

Bi-lateral Agreements of the United States with Canada and Mexico relating to AM, FM and TV Broadcasting.

2. The rule amendments adopted by this *Order* pursuant to authority delegated to the Chief, Mass Media Bureau, are ministerial only. They impose no new burdens, and change no established procedures or practices of the FCC. They merely update, clarify and correct the provisions of rules that provide for compliance by the United States with international commitments. Consequently, the rules revisions set out in Appendix 1 come within the exception in section 553(a)(1) of the Administrative Procedure Act, 5 U.S.C. 553(a)(1), and are, accordingly, adopted without notice and opportunity for comment in a rule making proceeding. Also, in view of the fact that the rule changes are merely ministerial amendments that bring the rules into conformity with obligations of the United States under treaties and international agreements to which it is a Signatory, good cause is found for excepting the present amendments, pursuant to section 553(d)(3) of the Administrative Procedure Act, 5 U.S. C. 553(d)(3), from the generally applicable requirement of publication at least 30 days before their effective date.

3. Because a general notice of proposed rule making is not required, the Regulatory Flexibility Act does not apply.

4. Accordingly, pursuant to section 4(d) of the Communications Act of 1934, as amended, 47 U.S.C. 154(d), and sections 0.61(b), and 0.283, of the FCC Rules, 47 C.F.R. secs. 0.61(b) and 0.283, IT IS ORDERED, That, effective upon publication in the Federal Register, Part 73 of the FCC Rules, 47 C.F.R. Part 73, IS AMENDED as stated in Appendix 1 below.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

APPENDIX 1

PART 73 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154 and 303.

2. Section 73.21 is amended by revising the portion of paragraph (b)(2) that follows the first sentence, and by removing Notes 1 and 2 after paragraph (c) and redesignating Notes 3 and 4 as Notes 1 and 2, to read as follows:

Sec. 73.21 Class of AM broadcast channels and stations

* * * * *

(b) * * *

(2) * * * Until the North American Regional Broadcasting Agreement (NARBA) is terminated with respect to the the Bahama Islands and the Dominican Republic, radiation toward those countries, respectively, from a Class III station in Puerto Rico or the Virgin Islands may not exceed the level that would be produced by an omnidirectional antenna with a transmitter power of 5 kW, or such lower level as will comply with NARBA requirements for protection of stations in the Bahama Islands and the Dominican Republic against objectionable interference.

* * * *

3 . Sec. 73.25 is amended by removing Notes 1 and 2 after paragraph (a)(2)(iii) and Note 1 after paragraph (c).

4. Sec. 73.28 is amended by revising paragraph (b), and by removing Notes (a) and (b), to read as follows:

Sec. 73.28 Assignment of stations to channels.

* * * * *

(b) The Commission will not make an AM station assignment that does not conform with international requirements and restrictions on spectrum use that the United States has accepted as a signatory to treaties, conventions, and other international agreements. *See* Sec. 73.1650 of this Chapter for a list of pertinent treaties, conventions and agreements, and Sec. 73.3570 for procedural provisions relating to compliance with them.

* * * * *

5. Sec. 73.183 is amended by revising the first sentence of the Note following paragraph (b), and revising paragraph (c), to read as follows:

Sec. 73.183 Groundwave signals.

* * * * *

(b) * * *

Note: International standards have not been established for determining ground conductivity by field strength measurements. * * *

(c)(1) In all cases where measurements taken in accordance with the requirements are not available, the groundwave strength must be determined by means of the pertinent map of ground conductivity and the groundwave curves of field strength versus distance. The conductivity of a given terrain may be determined by measurements of any broadcast signal traversing the terrain involved. Figure M3 (*See* Note 1) shows the conductivity throughout the United States by general areas of reasonably uniform conductivity. When it is clear that only one conductivity value is involved, Figure R3 of sec. 73.190, may be used. It is a replica of Figure M3, and is contained in these standards. In all other situations Figure M3 must be employed. It is recognized that in areas of limited size or over a particular path, the conductivity may vary widely from the values given; therefore, these maps are to be used only when accurate and acceptable measurements have not been made.

(2) For determinations of interference and service requiring a knowledge of ground conductivities in other countries, the ground conductivity maps comprising Appendix 1 to Annex 2 to each of the following international agreements may be used: (i) for Canada, the U.S. - Canada AM Agreement, 1984; (ii) for Mexico, the U.S. - Mexico AM Agreement, 1986; and (iii) for other Western Hemisphere countries, the Regional Agreement for the Medium Frequency Broadcasting Service in Region 2. Where different conductivities appear in the maps of two countries on opposite sides of the border, such differences are to be considered as real, even if they are not explained by geophysical cleavages.

Note 1: * * *

Note 2: * * *

* * * * *

6. Sec. 73.1650 is revised to read as follows:

Sec. 73.1650 International agreements.

(a) The rules in this Part 73, and authorizations for which they provide, are subject to compliance with the international obligations and undertakings of the United States. Accordingly, all provisions in this Part 73 are subject to compliance with applicable requirements, restrictions, and procedures accepted by the United States that have been established by or pursuant to treaties or other international agreements, arrangements, or understandings to which the United States is a signatory, including applicable annexes, protocols, resolutions, recommendations and other supplementing documents associated with such international instruments.

(b) The United States is a signatory to the following treaties and other international agreements that relate, in whole or in part, to AM, FM or TV broadcasting:

(i) The following instruments of the International Telecommunication Union:

(A) Constitution
(B) Convention
(C) Radio Regulations

(ii) Regional Agreement for the MF Broadcasting Service in Region 2 (Rio de Janeiro, 1981)

(iv) Bi-lateral Agreements between the United States and Canada relating to:

(A) AM Broadcasting
(B) FM Broadcasting
(C) TV Broadcasting

(v) Bi-lateral Agreements between the United States and Mexico relating to:

(A) AM Broadcasting
(B) FM Broadcasting
(C) TV Broadcasting

(vi) Bi-lateral Agreement between the United States and the Bahama Islands relating to presunrise operations by AM stations.

(vi) North American Regional Broadcasting Agreement (NARBA), which, for the United States, remains in effect with respect to the Dominican Republic and the Bahama Islands.

The documents listed in this paragraph are available for inspection in the office of the Chief, Policy and Rules Division, Mass Media Bureau, FCC, Washington, DC. Copies may be purchased from the FCC Copy Contractor, whose name may be obtained from the FCC Consumer Assistance Office.

7. Sec. 73.3570 is amended by revising the caption, and paragraphs (a), (b), and (d) to read as follows:

Sec. 73.3570 AM broadcast station applications affected by international agreements.

(a) Except as provided in paragraph (b) of this section, no application for an AM station will be accepted for filing if authorization of the facilities requested would be inconsistent with international commitments of the United States under treaties and other international agreements, arrangements and understandings. (*See* list of such international instruments in sec. 73.1650(b)). Any such application that is inadvertently accepted for filing will be dismissed.

(b) AM applications that involve conflicts only with the North American Regional Broadcasting Agreement (NARBA), but that are in conformity with the remaining treaties and other international agreements listed in sec. 73.1650(b) and with the other requirements of this Part 73, will be granted subject to such modifications as the FCC may subsequently find appropriate, taking international considerations into account.

* * * * *

(d) In some circumstances, special international considerations may require that the FCC, in acting on applications, follow procedures different from those established for general use. In such cases, affected applicants will be informed of the procedures to be followed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for
Cost Support Material
To Be Filed with January 1, 1990
Access Tariff Revisions

ORDER

Adopted: August 31, 1989; Released: September 1, 1989

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Order establishes a schedule and procedures for the filing of updates to the access tariff rates of local exchange carriers (LECs) effective January 1, 1990, in order to reflect certain changes affecting the January - June 1990 period. In conformance with the simplified rate correction methodology which we are permitting LECs to use to reflect these factors, we also establish requirements for simplified cost support material. Specific data submissions are detailed in the Tariff Update Format (TUF) appended to this Order. The TUF displays basic cost and demand information underlying existing rates and step-by-step adjustments to adjust that information, and thus the access rates, to reflect relevant factors.

II. BACKGROUND

2. Under the Access Charge Rules, Part 69 of the Commission Rules, 47 CFR Part 69, most LECs are required to update their access tariffs each year to retarget rates to the authorized rate of return and implement changes in Commission Rules and schedules, based upon projections of costs and demand in the upcoming year. For the past several years, the annual revisions were filed to become effective on January 1. However, in 1988 the Commission shifted the annual 1989 access tariff filings to an April 1, 1989 effective date, consolidated other scheduled tariff revisions, and adopted July 1 as the effective date for annual filings beginning in 1990. Access Tariff Filing Schedules, CC Docket No. 88-326, 3 FCC Rcd 5495 (1988) (*Access Schedule Order*). One effect of this revision in filing schedules was thus that the rates filed to become efective on April 1, 1989 would be scheduled to remain in effect until replaced 15 months later on July 1, 1990.

3. In the course of discussions to help formulate specific requirements for the April 1, 1989 filings, however, many LECs stated that it would be difficult for them to develop reliable forecasts extending into the first half of 1990, both for economic trends and the effects of changes that will occur in 1990. Based upon these considerations, the Common Carrier Bureau under delegated authority allowed the LECs to base the April 1, 1989 rates on an April through December 1989 test year. We also stated our intention to require the LECs to make a simplified flow-through filing effective January 1, 1990 to reflect important separations changes. Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, DA 88-1554 (1988).

4. In this Order, we designate the schedules and procedures for the simplified filing that will become effective January 1, 1990. Our decisions on these matters are guided by the Commission's directive that in resolving issues affecting these rates we "should give priority to assuring that the methodology used results in just and reasonable rates for the entire period from January 1, 1989 through June 30, 1990, based upon adequate supporting information." *Access Schedule Order*, 3 FCC Rcd at 5496.

III. SUPPORT INFORMATION

5. In prior annual filings, our requirements for support information were premised on the fact that the Part 69 Rules base rates on projected costs and demand for the annual rate period. Effective review of LEC projections requires analysis both of recent actual experience and of the basis for the trends and revised factors which the LECs used to compute their proposed rates. *See* Section 61.38 of the Commission's Rules. The circumstances of the January 1, 1990 rate revisions differ in ways which warrant different requirements. The rates will only be in effect for six months and will replace rates which received careful review. Thus, not only is the scope of the rate revisions briefer in time, but the baseline of actual data to assess the need for revising the existing rates is much shorter than usual. At best, the LECs will have available only three to five months of data on results under the April 1 rates, a baseline of limited reliability. Earlier data on costs and earnings are also not readily usable because of rule changes altering cost calculations effective April 1, 1989.

6. The filing procedures we have decided to adopt, and the information requirements we are establishing to implement these procedures, reflect these circumstances by allowing adjustments to current rates for scheduled changes in certain separations allocations, changes in allowed depreciation rates, and economic trends not embodied in current rates. The information required to be submitted includes a consistent format for displaying the effect of each relevant factor applied to update the LEC rate calculations. This Tariff Update Format (TUF) requires carriers to recast the projected cost and demand figures projected in their annual 1989 filings to reflect adjustments in the current rates. As a consistent starting point for all LECs, we will use the rates in effect on September 1, 1989 and the 1989 cost and demand figures implied by those rates as the baseline for LEC updates. The TUF display will show step by step the LEC development of this baseline from data filed as part of the 1989 annual filing, and then the LEC projections of the adjustments for each relevant update factor.

7. In the case of traffic-sensitive switched and special access rates, there is no clear or strong basis for presuming that relationships between cost and demand will differ from those reflected in the 1989 rates. The costs for these rate elements are derived from the separations process, which allocates a substantial portion of the costs between the interstate and intrastate jurisdictions based upon usage. This linkage of interstate traffic sensitive costs and demand buffers any changes in the cost-demand relationship. Development and evaluation of new relationships

for the numerous traffic sensitive rate elements and subelements would also substantially expand the scope of the filing and review process, but offer doubtful benefits in rate accuracy. We accordingly believe that use of the traffic sensitive cost-demand relationships embodied in existing rates is a reasonable simplifying assumption consistent with the goals of this proceeding: achieving reasonably accurate rates with a simplified filing.

8. Rates to recover non-traffic sensitive (NTS) costs present a different case. NTS costs are primarily those associated with local subscriber loops, and the interstate portion of those costs is designated as common line (CL) and recovered by end user common line (EUCL) rates paid by local subscribers on a per line basis and carrier common line (CCL) rates paid primarily by interexchange carriers based upon access minutes of use. Under this structure, CL costs depend upon the number of local loops used by subscribers for basic telephone service and the average cost of those loops. The allocation of those costs to the interstate jurisdiction is fixed at 25 percent, or at a transitional step toward that level, and thus is unrelated to actual interstate usage.

9. The demand side of the CL ratemaking equation, by contrast, includes both the number of local loops subject to EUCL charges and the level of long distance calling subject to CCL charges. The amount of long distance calling reflects long distance prices and service offerings, as well as economic and social conditions, but bears slight relationship to the number of local loops or their costs. Thus, there is no reason to expect a stable relationship between CL costs and demand. Our recent experience bears this out. Nationwide long distance demand has been growing at a significantly higher rate than nationwide CL costs, which has allowed lower CCL and long distance rates. Individual LECs, however, vary in their actual CL cost-demand relationships, and in particular cases a LEC's CL costs may even be growing faster than demand.

10. Exclusion of the effects of these independent cost and demand trends for CL rates would, under these conditions, be an oversimplification which could not be expected to produce reasonable rates for the varying local circumstances experienced by individual LECs. To provide a consistent, reasonable adjustment to CL rates which also conforms to our goal of filing simplicity, we will require all LECs to provide information showing trends in CL costs and demand from the first six months of 1988 to the first six months of 1989, as an indication of the trends which might reasonably be expected to continue into the first six months of 1990. This recent actual experience should provide a fair, unbiased basis for adjustment of the CL cost-demand relationship.

11. In order to keep the scope of this filing manageable, we are limiting the factors which the LECs must apply as a basis for January 1990 rate changes to those specified in this order and in the information request. These are changes in the Subscriber Plant Factor (SPF), Dial Equipment Minutes (DEMs), prescribed depreciation rates, the amortization of inside wire, and trends in Common Line costs and demand. However, both this limitation and the specific requirements for information are procedural mechanisms only and the LECs remain free, subject to normal tariff filing rules, to file other changes in access rates. Rate changes based on factors not included in this filing (*e.g.*, actual earnings results and projections) may be submitted in separate transmittals.

12. All LECs are required to provided the information required in the TUF to provide a consistent basis for review of their implementation of rate changes to reflect the factors for rate adjustments included in this required filing. And while we also believe that the TUF furnishes a practical framework from which LECs can compute updated rates, we do not require a LEC to use any specific formula or method for determining the amount of the change in costs, demand, and rates. For each factor included in the filing the LEC is required to explain and justify the methods used and the specific amount of the change in rates. To the extent that the filings conform to procedures described in this Order and to the TUF, we waive the further requirements of Section 61.38 of the Commission's Rules.

13. This rule waiver applies only to rate update factors that are consistent with the simplified method for which the TUF is designed, *i.e.*, updates to recast existing rates for specific factors without projections for other trends or events that may occur in 1990 (except for CL cost and demand trends). To the extent that a LEC wishes to use a different method to compute rate changes for any of the factors included in this filing, such as by including the effects of other changed conditions it claims will obtain in 1990, it may do so as part of this filing. However, because such claims raise broader issues beyond the scope of a simplified filing, all such claims must be supported by the normal support information required by Section 61.38, including the relevant sections of the most recent version of the TRP developed to provide such information. Similarly, in requiring LECs to report the recent annual change in CL costs and demand, we also are waiving other requirements for support information relevant to CL cost and demand relationships to the extent that LECs use this data to update CL rates. However, if a LEC wishes to base its CL rates on some method other than the simple extension of current cost and demand trends in the TUF, it may do so, subject to the normal cost support requirements appropriate to explain and justify the LEC's calculation, including information regarding past year actuals and future year projections.

IV. WAIVER REQUESTS

14. As in prior years, we are establishing a single schedule to consider all requests for waivers of the requirements of this Order, as well as of any other rules or orders affecting these filings. Unless the Commission or the Bureau have expressly stated otherwise, all substantive waivers applicable to the currently effective rates will also apply to this filing. This includes, for example, waivers granted to allow use of the $25 special access surcharge and the waiver relating to transport rate elements. LECs need not request extension of these waivers.

15. In considering other substantive waivers, or waivers of the procedures established in this Order, we expect to give particular attention to the method underlying this filing, a simplified but consistent set of updates limited to specific factors for a relatively brief period. Because requests for individualized treatment and exceptions among the many LECs affected are likely to threaten to enlarge the scope of the filings and impede effective review during the shortened filing schedule, we expect that any waiver request should be supported by a substantial showing of good cause. Requests for waiver shall be submitted no

later than September 11, 1989. Oppositions or comments on these requests will be due no later than September 18, 1989.

V. OTHER MATTERS

A. Application of This Order

16. The filing schedule and the requirement that LECs update their rates applies to all LECs access tariffs, both Tier 1 and Tier 2, except that small telephone companies whose rates are based upon historical costs or average schedule settlements are not required to file. *See* Section 61.39 of the Commission's Rules, 47 C.F.R. Section 61.39. NECA is required to file revisions updating the tariffs it files on behalf of its pool members, but because of its special circumstances as pool administrator and other individual responsibilities is not required to submit the information supporting its filing in the precise form described in this Order. NECA should use the update method to assure consistency with the other filings and should provide support material equivalent to that required for other tariffs, or information complying with Section 61.38 of the Rules. In order to allow LECs to revise CCL and EUCL rates properly, NECA shall also calculate long term (LTS) and transitional (TRS) support amounts and furnish such data to the LECs for inclusion in the TUF. NECA should calculate an annualized TRS based on an appropriate blend of the pre-April 1, 1990 TRS amount and the post-April 1, 1990 TRS amount.

17. We are also establishing simplified cost support requirements for those small telephone companies who file tariffs based upon prospective costs and thus are required to reflect the upcoming rule changes. Based upon discussions with Tier 2 LECs, we have ascertained that all Tier 2 LECs that file their own CCL rates are able to comply with the TUF requirements and that these requirements will aid in understanding and reviewing their filings. In general, these LECs are part of larger holding companies that own a significant number of Tier 1 LECs. The normal TUF will therefore apply to these Tier 2 companies.

18. A number of other Tier 2 LECs participate in NECA's CCL pool and tariff, but file their own tariffs for traffic sensitive (TS) or end user common line (EUCL) rates. Except in a few instances, these LECs are companies that have fewer than 50,000 lines, and are categorized as small companies under our rules.[1] Based upon discussions with these LECs to help match the costs and benefits of filing requirements, we are adopting the following simplifications of the TUF for this group of Tier 2 LECs. First, only LECs that file their own EUCL rates are required to populate the common line portions of the TUF. Because trends in costs and usage may be unreliable for such a small base of lines and the underlying data is often not readily available, we will also permit those LECs the option of basing RAFs for EUCL rates on their annual 1989 tariff filings, adjusted for SPF and other relevant exogenous changes, without adjustment for cost or usage changes. Where the LEC does not base its EUCL rates on cost and usage changes, it need not supply the corresponding data in the TUF. Second, these Tier 2 LECs are not required to file the "Exogenous Cost Change Detail" charts (Charts WS-7), provided that they supply explanations of the exogenous cost calculations in the description and justification accompanying their filing. The summary Chart WS-6 is required. Third, if these LECs calculate and apply the various RAFs to nonrecurring charges (NRCs) as well as to recurring charges, they are not required to submit TUF data regarding NRCs. Fourth, as indicated above, these LECs need not supply the TUFs in computerized form.

B. Errata

19. As we have noted in the past, the submission of inaccurate support data and the subsequent filing of errata seriously impede the ability of the Commission and interested parties to review the filings within the notice period. On the other hand, errata inevitably occur in filings as detailed, complex, and extensive as those required for annual access tariffs; it is of course essential that necessary errata be filed to correct such errors promptly. In previous annual filings, we have required that all errata filings be accompanied by a request for special permission to permit the transmittal as revised to become effective on the originally scheduled effective date. We continue to believe that the special permission requirement is a reasonable means of encouraging improvement in the quality of the data and allowing effective review of revisions and corrections, while providing flexibility for good cause. We will require that carriers file a request for special permission with any errata filed to correct errors or otherwise revise their tariff support data or the tariff rates and provisions. We remind carriers that carriers have a legal obligation to correct any erroneous data discovered in the TUF or other support data.

C. Certification

20. NECA and the LECs must certify the accuracy of the data that are submitted in support of proposed rates by including a signed statement by the responsible officer that the support data are true, correct, and complete. Certification is required for all data submitted in support of proposed rates, including all data that are required by the TUF. The text of the certification is the same as that adopted in prior years. *See* Annual 1987 Access Tariff Filings, Mimeo No. 6945, released Sept. 16, 1986.

D. Assistance from USTA

21. In order that the Commission and interested parties may estimate the national impact of proposed rates, we request that the USTA Task Force provide an aggregation of all TUF data in both hardcopy and disk format.

E. Technical Requirements

22. All filing entities are required to file their TUFs in computerized form (*i.e.*, floppy disks), except for Tier 2 LECs that participate in the NECA CCL pool, but file their own tariffs for EUCL or TS rate elements. Other details of the TUF are described in the accompanying documentation. We will specify other details of the filing, such as the number of copies, in a later public notice.

F. Schedules

23. Because of the more limited scope of these update filings, as compared with full-blown annual access tariff filings, we are adopting a shorter filing schedule. All filings are to be made no later than November 2, 1989 to be effective January 1, 1990. Petitions and comments are to be filed no later than November 20, 1989. Replies may be filed only by the entities that filed update tariffs and no

later than November 27, 1989. Requests for waivers of the data requirements in the TUF or of all other rule or order affecting this filing shall be submitted no later than September 11, 1989. Oppositions and comments concerning these requests shall be filed no later than September 18, 1989. No further pleadings are contemplated. Each carrier shall include all waiver requests in a single application and each party wishing to address the waiver requests shall include all comments and oppositions on all waiver requests in a single filing.

G. The Paperwork Reduction Act

24. In compliance with the Paperwork Reduction Act, we estimate burden-hours and include the Office of Management and Budget (OMB) control number and date on the TUF forms included with this Order. We also note that the TUF was developed after informal discussions with LECs and other industry representatives. The TUF filing requirement applies to all LECs required to revise their rates effective January 1, 1990 except for NECA, as indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy),
Common Carrier Bureau

FOOTNOTE

[1] Small telephone companies are defined as companies that have fewer than 50,000 lines and are not part of a holding compnay. *See* Section 61.39 of the Commission's Rules, 47 CFR Section 61.39.

T A R I F F U P D A T E

F O R M A T

100

110

120

Approved by OMB

3060 - 0432

Expires 11/26/89

130

Notice: The Tariff Update Format (TUF) contains information that certain local telephone companies must file to support their access charge tariff filings. The information is needed to provide a simplified, consistent format for a scheduled update of rates charged by local telephone companies and is used by the FCC to determine whether the services offered are just and reasonabe as required by the Communications Act of 1934, as amended. Your response is mandatory.

Public reporting burden for this collection of information is estimated to average 100 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Federal Communications Commission, Office of Managing Director, Washington, D.C. 20554, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (3060-0000), Washington, D.C. 20503.

This Notice is required by the Privacy Act of 1974, P.L. 93-579, December 31, 1974, 5 U.S.C. 522a(e)(3) and the Paperwork Reduction Act of 1980, P.L. 96-511, December 11, 1980, 44 U.S.C. 3504(c)(3)(c).

RATE FACTOR DEVELOPMENT
SWITCHED TRAFFIC SENSITIVE AND SPECIAL

(DOLLARS IN THOUSANDS)

TARIFF LEVEL:

	SWITCHED TRAFFIC SENSITIVE	REV. REQ. UNDERLYING CURRENT RATES *	NON-RECURRING AND ICB REV. IN COL. A	RECURRING REVENUES	NET REV. REQ. CHANGE **	ADJUSTED RECURRING REVENUES	RATE ADJUSTMENT FACTOR
		(A)	(B)	(C)=A-B	(D)	(E)=C+D	(F)=E/C
100	SWITCHING						
110	TRANSPORT						
120	INFORMATION						
	SPECIAL ACCESS						
130	SPECIAL ACCESS						

* SAME AS WS-3, COL. A

** FROM WS-3, COL. F

CARRIER COMMON LINE RATE DEVELOPMENT SUMMARY

(ALL AMOUNTS ARE IN WHOLE NUMBERS)

TARIFF ENTITY:

	DESCRIPTION	SOURCE	UNDERLYING 8/1/89 RATES *	PROPOSED 1/1/90	CHANGE	
			(A)	(B)	(C)=B-A	
100	TOTAL COMMON LINE REV. REQ.	WS-3 ROW 100,E				100
110	END USER REVENUES (INCLUDING SURCHARGE)	WS-14 ROW 100,B + WS-14 ROW 110,B				110
120	LONG TERM AND TRANSITIONAL SUPPORT	NECA				120
130	REV. REQ. TO BE RECOVERED FROM CCL	ROW 100 - ROW 110 + ROW 120				130
140	CHARGEABLE ORIGINATING RATED MOU	WS-10 ROW 100,C + (ROW 120,C * .45)				140
150	ORIGINATING REVENUES	ROW 140 * ROW 240				150
160	REVENUE REQUIREMENT TO BE RECOVERED FROM TERMINATING RATED MOU	ROW 130 - ROW 150				160
170	CHARGEABLE TERMINATING RATED MOU	WS-10 ROW 110,C + (ROW 130,C * .45)				170
	CCL MOU					
180	PREMIUM ORIG. - RATED	WS-10 ROW 100,C				180
190	NON-PREMIUM ORIG. - RATED	WS-10 ROW 120,C				190
200	CHARGEABLE ORIG. - RATED	ROW 140				
210	PREMIUM TERM. - RATED	WS-10 ROW 110,C				
220	NON-PREMIUM TERM. - RATED	WS-10 ROW 130,C				
230	CHARGEABLE TERM. - RATED	ROW 170				
	CCL RATE					
240	PREMIUM ORIGINATING	(FCC ORDER)				
250	NON-PREMIUM ORIGINATING	ROW 240 * .45				
260	PREMIUM TERMINATING	ROW 160 / ROW 170				
270	NON-PREMIUM TERMINATING	ROW 260 * .45				

* RATES IN EFFECT ON 8/1/89 UNLESS UPDATED BY LATER TRANSMITTAL PER COL'S D OR E ON WS-9

NOTE: ALL ENTRIES FOR COL. A ARE FROM 7/17/89 FILING UNDERLYING CURRENT CCL RATES

ALL ENTRIES FOR COL. B ARE REFERENCED IN THE SOURCE COLUMN

COST ANALYSIS SUMMARY WS-3

(DOLLARS IN THOUSANDS)

TARIFF LEVEL:

	COST CATEGORIES	REV. REQ. UNDERLYING CURRENT RATES *	EXOGENOUS COST ADJUSTMENT FACTOR **	ADJUSTED BASE REV. REQ.	REV. REQ. GROWTH FACTOR	ANNUALIZED TEST PERIOD REV. REQ.	NET REV. REQ. CHANGE
		(A)	(B)	(C)=A*B	(D)	(E)=C*D	(F)=E-A
100	COMMON LINE		N/A		N/A		
110	BFP (***)						
120	ISW				1.0000		
130	PAY				1.0000		
140	SWITCHED TRAFFIC SENSITIVE		N/A		N/A		
150	SWITCHING				1.0000		
160	TRANSPORT				1.0000		
170	INFORMATION				1.0000		
180	SPECIAL ACCESS				1.0000		
190	TOTAL ACCESS		N/A		N/A		

* SOURCE IS WS-9 COLUMN F

** SOURCE IS WS-4 COLUMN D

*** SOURCE IS WS-5 SUMMARIZED TO TARIFF LEVEL

EXOGENOUS COST FACTOR DEVELOPMENT

(DOLLARS IN THOUSANDS)

TARIFF LEVEL:

	COST CATEGORIES	REV. REQ. UNDERLYING 4/1/89 RATES EXCLUDING FCC ADJUST. **	EXOGENOUS COST CHANGES *	REV. REQ. ADJUSTED FOR EXOGENOUS COST CHANGES	EXOGENOUS COST GROWTH FACTOR
		(A)	(B)	(C)=A+B	(D)=1+((C-A)/A)
100	COMMON LINE				N/A
110	BFP (***)				
120	ISW				
130	PAY				
140	SWITCHED TRAFFIC SENSITIVE				N/A
150	SWITCHING				
160	TRANSPORT				
170	INFORMATION				
180	SPECIAL ACCESS				
190	TOTAL ACCESS				N/A

* SOURCE IS WS-6 COLUMN G

** SOURCE IS SAME AS WS-9 COL. A
SHOULD BE THE SAME AS FEBRUARY ERRATA OR OTHER
TRANSMITTALS GRANTED BY THE FCC

COMMON LINE - BASE FACTOR PORTION
REVENUE REQUIREMENT DEVELOPMENT

(DOLLARS IN THOUSANDS)

STUDY AREA:

		AMOUNT
	REVENUE REQUIREMENTS	(A)
100	REV. REQ. UNDERLYING CURRENT RATES * (INCLUDING FCC ADJUSTMENTS)	
110	ADJUSTED BASE REV. REQ. (L100 * L160)	
120	ANNUALIZED TEST PERIOD REV. REQ. (L110 * 210)	
	EXOGENOUS COST FACTORS	
130	REV. REQ. UNDERLYING 4/1/89 RATES ** (EXCLUDING FCC ADJUSTMENTS)	
140	EXOGENOUS COST CHANGES ***	
150	REV. REQ. ADJUSTED FOR EXOGENOUS COST CHANGES (L130 + L140)	
160	EXOGENOUS COST ADJUSTMENT FACTOR (1+ ((L160 - L130) / L130))	
	BFP GROWTH FACTOR	
170	BFP REV. REQ. (1/89 THRU 6/89)	
180	1989 SPF	
190	BFP REV. REQ. (1/88 THRU 6/88)	
200	1988 SPF	
210	BFP GROWTH FACTOR ((L170 / L160) / (L190 / L200)) ^ (7.5/12)	

* SAME AS WS-9 COL. F SUMMARIZED AT TARIFF LEVEL

** SAME AS WS-9 COL. A SUMMARIZED AT TARIFF LEVEL

*** SAME AS WS-6 COL. G SUMMARIZED AT TARIFF LEVEL

EXOGENOUS COST CHANGES

(DOLLARS IN THOUSANDS)

TARIFF LEVEL:

	COST CATEGORIES	REV. REQ. UNDERLYING 4/1/89 RATES EXCLUDING FCC ADJUST. **	SPF	INSIDE WIRE	DEM	DEPRECIATION REPRESCRIPTION AND AMORTIZATION	OTHER ***	TOTAL EXOGENOUS COST CHANGES
		(A)	(B)	(C)	(D)	(E)	(F)	(G)
100	COMMON LINE							
110	BFP (***)							
120	ISW							
130	PAY							
140	SWITCHED TRAFFIC SENSITIVE							
150	SWITCHING							
160	TRANSPORT							
170	INFORMATION							
180	SPECIAL ACCESS							
190	TOTAL ACCESS							

* MAY NOT EQUAL THE SUM OF COLUMNS B THRU F DUE TO THE INTERACTIVE EFFECTS OF EACH RULE CHANGE

** SAME SOURCE AS WS-9 COL. A

*** MAY BE USED PRUSUANT TO WAIVER ONLY

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS) WS-7.1
1 OF 2

COSTS UNDERLYING 4/1/89 RATES (EXCLUDING FCC ADJUSTMENTS)

STUDY AREA:

		COMMON LINE			
		BFP	ISW	PAY	TOTAL
		(A)	(B)	(C)	(D)=A+B+C
	REVENUES				
100	REVENUE REQUIREMENTS				
110	MISCELLANEOUS REV. & UNCOLLECTIBLES				
	EXPENSES				
120	PLANT SPECIFIC				
130	NON-PLT SPECIFIC				
140	MARKETING				
150	CUSTOMER OPER SVC				
160	CORPORATE OPER				
170	OTHER				
180	DEPRE & AMORT				
190	TOTAL EXPENSES				
	TAXES				
200	OTHER TAXES				
210	FIXED CHARGES				
220	FEDERAL INCOME				
	INVESTMENT				
230	GSF				
240	COE SW				
250	COE TRANS				
260	C&W				
270	I O/T				
280	OTHER INV				
290	TOTAL INVESTMENT				
	RESERVES				
300	DEPR AND AMORT				
310	DEFERRED				
320	OTHER				
330	TOTAL RESERVES				
340	AVERAGE NET INVESTMENT				
350	NET RETURN				

NOTE: SEE 1989 TARIFF REVIEW PLAN FOR DEFINITION OF COST CATEGORIES

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS)

WS-7.1
2 OF 2

COSTS UNDERLYING 4/1/89 RATES (EXCLUDING FCC ADJUSTMENTS)

STUDY AREA:

		SWITCHED TRAFFIC SENSITIVE					
		SWITCHING	TRANSPORT	INFORMATION	TOTAL	SPECIAL ACCESS	TOTAL INTERSTATE ACCESS
		(E)	(F)	(G)	(H)=E+F+G	(I)	(J)=D+H+I
	REVENUES						
100	REVENUE REQUIREMENTS						
110	MISCELLANEOUS REV. & UNCOLLECTIBLES						
	EXPENSES						
120	PLANT SPECIFIC						
130	NON-PLT SPECIFIC						
140	MARKETING						
150	CUSTOMER OPER SVC						
160	CORPORATE OPER						
170	OTHER						
180	DEPRE & AMORT						
190	TOTAL EXPENSES						
	TAXES						
200	OTHER TAXES						
210	FIXED CHARGES						
220	FEDERAL INCOME						
	INVESTMENT						
230	GSF						
240	COE SW						
250	COE TRANS						
260	C&W						
270	I O/T						
280	OTHER INV						
290	TOTAL INVESTMENT						
	RESERVES						
300	DEPR AND AMORT						
310	DEFERRED						
320	OTHER						
330	TOTAL RESERVES						
340	AVERAGE NET INVESTMENT						
350	NET RETURN						

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS)

WS-7.2
1 OF 2

EXOGENOUS COST CHANGE FOR - SPF

STUDY AREA:

		COMMON LINE			
		BFP	ISW	PAY	TOTAL
		(A)	(B)	(C)	(D)=A+B+C
	REVENUES				
100	REVENUE REQUIREMENTS				
110	MISCELLANEOUS REV. & UNCOLLECTIBLES				
	EXPENSES				
120	PLANT SPECIFIC				
130	NON-PLT SPECIFIC				
140	MARKETING				
150	CUSTOMER OPER SVC				
160	CORPORATE OPER				
170	OTHER				
180	DEPRE & AMORT				
190	TOTAL EXPENSES				
	TAXES				
200	OTHER TAXES				
210	FIXED CHARGES				
220	FEDERAL INCOME				
	INVESTMENT				
230	GSF				
240	COE SW				
250	COE TRANS				
260	C&W				
270	I O/T				
280	OTHER INV				
290	TOTAL INVESTMENT				
	RESERVES				
300	DEPR AND AMORT				
310	DEFERRED				
320	OTHER				
330	TOTAL RESERVES				
340	AVERAGE NET INVESTMENT				
350	NET RETURN				

NOTE: SEE 1989 TARIFF REVIEW PLAN FOR DEFINITION OF COST CATEGORIES

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS)

EXOGENOUS COST CHANGE FOR - SPF

STUDY AREA:

		SWITCHED TRAFFIC SENSITIVE					
		SWITCHING	TRANSPORT	INFORMATION	TOTAL	SPECIAL ACCESS	TOTAL INTERSTATE ACCESS
		(E)	(F)	(G)	(H)=E+F+G	(I)	(J)=D+H+I
	REVENUES						
100	REVENUE REQUIREMENTS						
110	MISCELLANEOUS REV. & UNCOLLECTIBLES						
	EXPENSES						
120	PLANT SPECIFIC						
130	NON-PLT SPECIFIC						
140	MARKETING						
150	CUSTOMER OPER SVC						
160	CORPORATE OPER						
170	OTHER						
180	DEPRE & AMORT						
190	TOTAL EXPENSES						
	TAXES						
200	OTHER TAXES						
210	FIXED CHARGES						
220	FEDERAL INCOME						
	INVESTMENT						
230	GSF						
240	COE SW						
250	COE TRANS						
260	C&W						
270	I O/T						
280	OTHER INV						
290	TOTAL INVESTMENT						
	RESERVES						
300	DEPR AND AMORT						
310	DEFERRED						
320	OTHER						
330	TOTAL RESERVES						
340	AVERAGE NET INVESTMENT						
350	NET RETURN						

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS) WS-7.3
1 OF 2

EXOGENOUS COST CHANGE FOR - INSIDE WIRE

STUDY AREA:

		COMMON LINE			
		BFP	ISW	PAY	TOTAL
		(A)	(B)	(C)	(D)=A+B+C
	REVENUES				
100	REVENUE REQUIREMENTS				
110	MISCELLANEOUS REV. & UNCOLLECTIBLES				
	EXPENSES				
120	PLANT SPECIFIC				
130	NON-PLT SPECIFIC				
140	MARKETING				
150	CUSTOMER OPER SVC				
160	CORPORATE OPER				
170	OTHER				
180	DEPRE & AMORT				
190	TOTAL EXPENSES				
	TAXES				
200	OTHER TAXES				
210	FIXED CHARGES				
220	FEDERAL INCOME				
	INVESTMENT				
230	GSF				
240	COE SW				
250	COE TRANS				
260	C&W				
270	I O/T				
280	OTHER INV				
290	TOTAL INVESTMENT				
	RESERVES				
300	DEPR AND AMORT				
310	DEFERRED				
320	OTHER				
330	TOTAL RESERVES				
340	AVERAGE NET INVESTMENT				
350	NET RETURN				

NOTE: SEE 1989 TARIFF REVIEW PLAN FOR DEFINITION OF COST CATEGORIES

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS)

EXOGENOUS COST CHANGE FOR - INSIDE WIRE

STUDY AREA:

		SWITCHED TRAFFIC SENSITIVE				SPECIAL ACCESS	TOTAL INTERSTATE ACCESS
		SWITCHING	TRANSPORT	INFORMATION	TOTAL		
		(E)	(F)	(G)	(H)=E+F+G	(I)	(J)=D+H+I
	REVENUES						
100	REVENUE REQUIREMENTS						
110	MISCELLANEOUS REV. & UNCOLLECTIBLES						
	EXPENSES						
120	PLANT SPECIFIC						
130	NON-PLT SPECIFIC						
140	MARKETING						
150	CUSTOMER OPER SVC						
160	CORPORATE OPER						
170	OTHER						
180	DEPRE & AMORT						
190	TOTAL EXPENSES						
	TAXES						
200	OTHER TAXES						
210	FIXED CHARGES						
220	FEDERAL INCOME						
	INVESTMENT						
230	GSF						
240	COE SW						
250	COE TRANS						
260	C&W						
270	I O/T						
280	OTHER INV						
290	TOTAL INVESTMENT						
	RESERVES						
300	DEPR AND AMORT						
310	DEFERRED						
320	OTHER						
330	TOTAL RESERVES						
340	AVERAGE NET INVESTMENT						
350	NET RETURN						

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS)

EXOGENOUS COST CHANGE FOR - DEM

STUDY AREA:

		COMMON LINE			
		BFP	ISW	PAY	TOTAL
		(A)	(B)	(C)	(D)=A+B+C
	REVENUES				
100	REVENUE REQUIREMENTS				
110	MISCELLANEOUS REV. & UNCOLLECTIBLES				
	EXPENSES				
120	PLANT SPECIFIC				
130	NON-PLT SPECIFIC				
140	MARKETING				
150	CUSTOMER OPER SVC				
160	CORPORATE OPER				
170	OTHER				
180	DEPRE & AMORT				
190	TOTAL EXPENSES				
	TAXES				
200	OTHER TAXES				
210	FIXED CHARGES				
220	FEDERAL INCOME				
	INVESTMENT				
230	GSF				
240	COE SW				
250	COE TRANS				
260	C&W				
270	I O/T				
280	OTHER INV				
290	TOTAL INVESTMENT				
	RESERVES				
300	DEPR AND AMORT				
310	DEFERRED				
320	OTHER				
330	TOTAL RESERVES				
340	AVERAGE NET INVESTMENT				
350	NET RETURN				

NOTE: SEE 1989 TARIFF REVIEW PLAN FOR DEFINITION OF COST CATEGORIES

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS)

EXOGENOUS COST CHANGE FOR - DEM

STUDY AREA:

		SWITCHED TRAFFIC SENSITIVE					
		SWITCHING	TRANSPORT	INFORMATION	TOTAL	SPECIAL ACCESS	TOTAL INTERSTATE ACCESS
		(E)	(F)	(G)	(H)=E+F+G	(I)	(J)=D+H+I
	REVENUES						
100	REVENUE REQUIREMENTS						
110	MISCELLANEOUS REV. & UNCOLLECTIBLES						
	EXPENSES						
120	PLANT SPECIFIC						
130	NON-PLT SPECIFIC						
140	MARKETING						
150	CUSTOMER OPER SVC						
160	CORPORATE OPER						
170	OTHER						
180	DEPRE & AMORT						
190	TOTAL EXPENSES						
	TAXES						
200	OTHER TAXES						
210	FIXED CHARGES						
220	FEDERAL INCOME						
	INVESTMENT						
230	GSF						
240	COE SW						
250	COE TRANS						
260	C&W						
270	I O/T						
280	OTHER INV						
290	TOTAL INVESTMENT						
	RESERVES						
300	DEPR AND AMORT						
310	DEFERRED						
320	OTHER						
330	TOTAL RESERVES						
340	AVERAGE NET INVESTMENT						
350	NET RETURN						

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS) WS-7.5
1 OF 2

EXOGENOUS COST CHANGE FOR - DEPRECIATION & AMORT.

STUDY AREA:

		COMMON LINE			
		BFP	ISW	PAY	TOTAL
		(A)	(B)	(C)	(D)=A+B+C
	REVENUES				
100	REVENUE REQUIREMENTS				
110	MISCELLANEOUS REV. & UNCOLLECTIBLES				
	EXPENSES				
120	PLANT SPECIFIC				
130	NON-PLT SPECIFIC				
140	MARKETING				
150	CUSTOMER OPER SVC				
160	CORPORATE OPER				
170	OTHER				
180	DEPRE & AMORT				
190	TOTAL EXPENSES				
	TAXES				
200	OTHER TAXES				
210	FIXED CHARGES				
220	FEDERAL INCOME				
	INVESTMENT				
230	GSF				
240	COE SW				
250	COE TRANS				
260	C&W				
270	I O/T				
280	OTHER INV				
290	TOTAL INVESTMENT				
	RESERVES				
300	DEPR AND AMORT				
310	DEFERRED				
320	OTHER				
330	TOTAL RESERVES				
340	AVERAGE NET INVESTMENT				
350	NET RETURN				

NOTE: SEE 1989 TARIFF REVIEW PLAN FOR DEFINITION OF COST CATEGORIES

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS)

EXOGENOUS COST CHANGE FOR - DEPRECIATION & AMORT.

STUDY AREA:

		SWITCHED TRAFFIC SENSITIVE					TOTAL
		SWITCHING	TRANSPORT	INFORMATION	TOTAL	SPECIAL ACCESS	INTERSTATE ACCESS
		(E)	(F)	(G)	(H)=E+F+G	(I)	(J)=D+H+I
	REVENUES						
100	REVENUE REQUIREMENTS						
110	MISCELLANEOUS REV. & UNCOLLECTIBLES						
	EXPENSES						
120	PLANT SPECIFIC						
130	NON-PLT SPECIFIC						
140	MARKETING						
150	CUSTOMER OPER SVC						
160	CORPORATE OPER						
170	OTHER						
180	DEPRE & AMORT						
190	TOTAL EXPENSES						
	TAXES						
200	OTHER TAXES						
210	FIXED CHARGES						
220	FEDERAL INCOME						
	INVESTMENT						
230	GSF						
240	COE SW						
250	COE TRANS						
260	C&W						
270	I O/T						
280	OTHER INV						
290	TOTAL INVESTMENT						
	RESERVES						
300	DEPR AND AMORT						
310	DEFERRED						
320	OTHER						
330	TOTAL RESERVES						
340	AVERAGE NET INVESTMENT						
350	NET RETURN						

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS) WS-7.6

EXOGENOUS COST CHANGE FOR - OTHER (PURSUANT TO WAIVER ONLY)

STUDY AREA:

		COMMON LINE			
		BFP	ISW	PAY	TOTAL
		(A)	(B)	(C)	(D)=A+B+C
	REVENUES				
100	REVENUE REQUIREMENTS				
110	MISCELLANEOUS REV. & UNCOLLECTIBLES				
	EXPENSES				
120	PLANT SPECIFIC				
130	NON-PLT SPECIFIC				
140	MARKETING				
150	CUSTOMER OPER SVC				
160	CORPORATE OPER				
170	OTHER				
180	DEPRE & AMORT				
190	TOTAL EXPENSES				
	TAXES				
200	OTHER TAXES				
210	FIXED CHARGES				
220	FEDERAL INCOME				
	INVESTMENT				
230	GSF				
240	COE SW				
250	COE TRANS				
260	C&W				
270	I O/T				
280	OTHER INV				
290	TOTAL INVESTMENT				
	RESERVES				
300	DEPR AND AMORT				
310	DEFERRED				
320	OTHER				
330	TOTAL RESERVES				
340	AVERAGE NET INVESTMENT				
350	NET RETURN				

NOTE: SEE 1989 TARIFF REVIEW PLAN FOR DEFINITION OF COST CATEGORIES

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS)

EXOGENOEXOGENOUS COST CHANGE FOR - OTHER (PURSUANT TO WAIVER ONLY)

STUDY AREA:

		SWITCHED TRAFFIC SENSITIVE					
		SWITCHING	TRANSPORT	INFORMATION	TOTAL	SPECIAL ACCESS	TOTAL INTERSTATE ACCESS
		(E)	(F)	(G)	(H)=E+F+G	(I)	(J)=D+H+I
	REVENUES						
100	REVENUE REQUIREMENTS						
110	MISCELLANEOUS REV. & UNCOLLECTIBLES						
	EXPENSES						
120	PLANT SPECIFIC						
130	NON-PLT SPECIFIC						
140	MARKETING						
150	CUSTOMER OPER SVC						
160	CORPORATE OPER						
170	OTHER						
180	DEPRE & AMORT						
190	TOTAL EXPENSES						
	TAXES						
200	OTHER TAXES						
210	FIXED CHARGES						
220	FEDERAL INCOME						
	INVESTMENT						
230	GSF						
240	COE SW						
250	COE TRANS						
260	C&W						
270	I O/T						
280	OTHER INV						
290	TOTAL INVESTMENT						
	RESERVES						
300	DEPR AND AMORT						
310	DEFERRED						
320	OTHER						
330	TOTAL RESERVES						
340	AVERAGE NET INVESTMENT						
350	NET RETURN						

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS)

TOTAL EXOGENOUS COST CHANGES

STUDY AREA:

		COMMON LINE			
		BFP	ISW	PAY	TOTAL
		(A)	(B)	(C)	(D)=A+B+C
	REVENUES				
100	REVENUE REQUIREMENTS				
110	MISCELLANEOUS REV. & UNCOLLECTIBLES				
	EXPENSES				
120	PLANT SPECIFIC				
130	NON-PLT SPECIFIC				
140	MARKETING				
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180	DEPRE & AMORT				
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	INVESTMENT				
230	GSF				
240	COE SW				
250	COE TRANS				
260	C&W				
270	I O/T				
280	OTHER INV				
290	TOTAL INVESTMENT				
	RESERVES				
300	DEPR AND AMORT				
310	DEFERRED				
320	OTHER				
330	TOTAL RESERVES				
340	AVERAGE NET INVESTMENT				
350	NET RETURN				

NOTE: SEE 1989 TARIFF REVIEW PLAN FOR DEFINITION OF COST CATEGORIES

EXOGENOUS COST CHANGE DETAIL

(DOLLARS IN THOUSANDS)

TOTAL EXOGENOUS COST CHANGES

STUDY AREA:

		SWITCHED TRAFFIC SENSITIVE					
		SWITCHING	TRANSPORT	INFORMATION	TOTAL	SPECIAL ACCESS	TOTAL INTERSTATE ACCESS
		(E)	(F)	(G)	(H)=E+F+G	(I)	(J)=D+H+I
	REVENUES						
100	REVENUE REQUIREMENTS						
110	MISCELLANEOUS REV. & UNCOLLECTIBLES						
	EXPENSES						
120	PLANT SPECIFIC						
130	NON-PLT SPECIFIC						
140	MARKETING						
150	CUSTOMER OPER SVC						
160	CORPORATE OPER						
170	OTHER						
180	DEPRE & AMORT						
190	TOTAL EXPENSES						
	TAXES						
200	OTHER TAXES						
210	FIXED CHARGES						
220	FEDERAL INCOME						
	INVESTMENT						
230	GSF						
240	COE SW						
250	COE TRANS						
260	C&W						
270	I O/T						
280	OTHER INV						
290	TOTAL INVESTMENT						
	RESERVES						
300	DEPR AND AMORT						
310	DEFERRED						
320	OTHER						
330	TOTAL RESERVES						
340	AVERAGE NET INVESTMENT						
350	NET RETURN						

STUDY AREA:

		AMOUNT (A)
	SUBSCRIBER PLANT FACTOR	
100	SPF 1989	
110	SPF 1990	
	DIAL EQUIPMENT MINUTE FACTOR	
120	1989 COMPOSITE ALLOCATOR	
130	1989 DEM	
140	1989 LOC. SW. TRANSITION FACTOR (.7 * ROW 120)+(.3 * ROW 130)	
150	1990 COMPOSITE ALLOCATOR	
160	1990 DEM	
170	1990 LOC. SW. TRANSITION FACTOR (.5 * ROW 150+(.5 * ROW 160)	
	TOTAL UNSEPARATED DEPRECIATION EXPENSE CHANGE FOR 1990	
180	CHANGE DUE TO REPRESCRIPTION	
190	CHANGE DUE TO RESERVE AMORT.	
200	TOTAL 1990 CHANGE (ROW 180+ROW 190)	
210	INSIDE WIRE AMORTIZATION STATUS:	
211		
212		
213		
214		
215		
220	DEPRECIATION: (DESCRIBE)	
221		
222		
223		
224		
225		
230	OTHER (DESCRIBE)	
231		
232		
233		
234		
235		

DEVELOPMENT OF REVENUE REQUIREMENT UNDERLYING CURRENT RATES WS-9

(DOLLARS IN THOUSANDS)

TARIFF LEVEL:

	COST CATEGORIES	REV. REQ. UNDERLYING 4/1/89 RATES EXCLUDING FCC ADJUSTMENT	FCC ADJUSTMENTS 3/22/89 *	FCC ADJUSTMENTS 6/29/89 *	OTHER ADJ. BY TRANSMITTAL *	OTHER ADJ. BY TRANSMITTAL *	REV. REQ. UNDERLYING CURRENT RATES **
		(A)	(B)	(C)	(D)	(E)	(F)=A+B+C+D
100	COMMON LINE						
110	BFP						
120	ISW						
130	PAY						
140	SWITCHED TRAFFIC SENSITIVE						
150	SWITCHING						
160	TRANSPORT						
170	INFORMATION						
180	SPECIAL ACCESS						
190	TOTAL ACCESS						
200	TRANSMITTAL NUMBER ***						
210	TRANSMITTAL DATE ****						

* IDENTIFY TRANSMITTAL ASSOCIATED WITH THIS VIEW

** MUST AGREE WITH WS-3, COL. A

*** THE TRANSMITTAL NUMBER FOR COL.'S B, C, D AND E SHOULD BE ENTERED ON ROW 200.
ENTER "NONE" IF NO TRANSMITTALS WERE SUBMITTED

**** THE TRANSMITTAL DATE SHOULD BE ENTERED ON ROW 210.
ENTER "NONE" IF NO TRANSMITTALS WERE SUBMITTED

COMMON LINE DEMAND - MOU

(MINUTES IN THOUSANDS)

TARIFF LEVEL:

	COMMON LINE DEMAND	DEMAND UNDERLYING 4/1/89 RATES **	DEMAND GROWTH FACTOR	TEST PERIOD DEMAND
		(A)	(B)	(C)=A*B
	MINUTES			
100	CCL ORIG. PREM.			
110	CCL TERM. PREM.			
120	CCL ORIG. NON-PREM.			
130	CCL TERM. NON-PREM.			

* SOURCE IS WS-11

** DEMAND UNDERLYING 4/1/89 RATES (INCLUDING FCC ADJUSTMENTS)
UNLESS UPDATED BY A LATER TRANSMITTAL PER COL"S D & E OF WS-9

COMMON LINE MINUTES OF USE GROWTH FACTOR DEVELOPMENT

(MINUTES IN THOUSANDS)

TARIFF ENTITY :

	CCL MOU GROWTH FACTOR	AMOUNT
		(A)
	PREMIUM ORIGINATING MOU	
100	PREMIUM ORIG. MOU (1/89 THRU 6/89)	
110	PREMIUM ORIG. MOU (1/88 THRU 6/88)	
120	PREMIUM ORIG. MOU GROWTH FACTOR (NOTE 1)	
	PREMIUM TERMINATING MOU	
130	PREMIUM TERM. MOU (1/89 THRU 6/89)	
140	PREMIUM TERM. MOU (1/88 THRU 6/88)	
150	PREMIUM TERM. MOU GROWTH FACTOR (NOTE 2)	
	NON-PREMIUM ORIGINATING MOU	
160	NON-PREMIUM ORIG. MOU (1/89 THRU 6/89)	
170	NON-PREMIUM ORIG. MOU (1/88 THRU 6/88)	
180	NON-PREMIUM ORIG. MOU GROWTH FACTOR (NOTE 3)	
	NON-PREMIUM TERMINATING MOU	
190	NON-PREMIUM TERM. MOU (1/89 THRU 6/89)	
200	NON-PREMIUM TERM. MOU (1/88 THRU 6/88)	
210	NON-PREMIUM TERM. MOU GROWTH FACTOR (NOTE 4)	

NOTE 1: (L100 / L110) ^ (7.5/12)
NOTE 2: (L130 / L140) ^ (7.5/12)
NOTE 3: (L160 / L170) ^ (7.5/12)
NOTE 4: (L190 / L200) ^ (7.5/12)

COMMON LINE DEMAND - ACCESS LINES

STUDY AREA:

	COMMON LINE DEMAND	DEMAND UNDERLYING 4/1/89 RATES **	DEMAND GROWTH FACTOR	TEST PERIOD DEMAND
		(A)	(B)	(C)=A*B
	LINES			
100	RESIDENCE, SINGLE LINE BUS. & LIFELINE SUBSCRIBER LINES			
110	MULTILINE BUSINESS & CENTREX			
120	SURCHARGE LINES			

* SOURCE IS WS-13

** DEMAND UNDERLYING 4/1/89 FILING (INCLUDING FCC ADJUSTMENTS) UNLESS UPDATED BY A LATER TRANSMITTAL PER COL"S D & E OF WS-9

COMMON LINE DEMAND -
ACCESS LINE GROWTH FACTORS

STUDY AREA :

		AMOUNT
		(A)
	LINE GROWTH FACTORS	
	SINGLE LINE BUSINESS AND RESIDENCE LINE GROWTH FACTOR	
100	SLB & RES. LINES (1Q89)	
110	SLB & RES LINES (1Q88)	
120	SLB & RES. LINES GROWTH FACTOR (NOTE 1)	
	MULTILINE BUSINESS (INCL. CTX) LINE GROWTH FACTOR	
130	MULTILINE BUS. (INCL CTX) LINES (1Q89)	
140	MULTILINE BUS. (INCL CTX) LINES (1Q88)	
150	MULTILINE BUS. (INCL CTX) LINE GROWTH FACTOR (NOTE 2)	
	SURCHARGEABLE LINES GROWTH FACTOR	
160	SURCHARGEABLE LINES (1Q89)	
170	SURCHARGEABLE LINES (1Q88)	
180	SURCHARGEABLE LINE GROWTH FACTOR (NOTE 3)	

GENERAL - ALL LINE COUNTS ARE END OF PERIOD

NOTE 1: (L100 / L110) ^ (7.5/12)
NOTE 2: (L130 / L140) ^ (7.5/12)
NOTE 3: (L160 / L170) ^ (7.5/12)

ANNUALIZED
ACCESS PRICEOUT
COMPARISONS

(DOLLARS IN THOUSANDS)

TARIFF ENTITY:

		REVENUES AT CURRENT RATES (A)	REVENUES AT PROPOSED RATES (B)	CHANGE (C)=B-A
100	TOTAL MULTI-LINE BUSINESS (INCL CTX AND SURCHARGABLE LINES)			
110	TOTAL RESIDENCE AND SINGLE-LINE BUSINESS			
120	TOTAL CCL			
130	TOTAL TS-SWITCHED (EXCL. DA)			
140	TOTAL SPECIAL			
150	DIRECTORY ASSISTANCE			

NOTE: 1. REVENUES ARE CALCULATED USING DEMAND UNDERLYING PROPOSED RATES. THE DEMAND USED TO CALCULATE THE REVENUES IN COL'S A AND B SHOULD BY IDENTICAL.

2. ATTACH A SEPARATE TABLE TO IDENTIFY THE MULTI-LINE BUSINESS SUBSCRIBER LINE CHARGE IN EACH JURISDICTION

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